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IN THE

Supreme Court of the United States

No. 468

October Term, 1949

WIRT A. WARREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Wirt A. Warren, prays that a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, which affirmed the decision and judgment of the United States District Court for the District of Kansas, second division, finding that when petitioner advised his stepson concerning registering under the Selective Service Act of 1948 he was violating that part of section 12 (a) Title I of the act which reads:

"* * * any person * * * who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any requirements of this title, or of said rules, regulations or directions * * * shall, upon conviction * * * be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment". 50 App. USCA 462 (a)

STATEMENT OF THE MATTER INVOLVED

Dr. Wirt A. Warren, two weeks to a month before his stepson's eighteenth birthday, while they were washing dishes together, told his son that he thought the son should not register for the draft. There was some discussion of the consequences of opposition to registration, the father indicating that sometimes law violation was better than moral surrender to evil. This discussion was a part of the father's attempt to instruct his son in "education", and in "moral and social and religious ways of life" (R. 21, 23, 36, 40). He considered he had a right and a moral obligation to do this. He also mentioned, what the law permits, non-registration while outside the country. Dr. Warren was a Unitarian, a religious conscientious objector opposed to all war and violence, who had been classified as such in 1944 and had served about two years in a Quaker Civilian Public Service mental hospital unit. The son treated the conversation as a mere suggestion or wish of his father. It never affected his intentions. The son in fact registered (R. 23, 48). Dr. Warren never counselled anyone else and has always been a loyal citizen.

The real basis of the prosecution seems to have been a letter written by Mr. Warren to the United States Attorney General in an attempt to keep his action non-evasive and on a high moral plane, stating that he had counselled his son, intended to advise others and justified this as morally and religiously required (R. 17, 26).

Petitioner on the trial and in the Circuit Court of Appeals raised the following issues:

1. Section 12(a) of the 1948 Selective Service Law ("counsels, aids or abets another to evade or refuse registration") defines the crime of accessory and Dr. Warren cannot be found guilty since the primary crime of non-registration was never committed.

2. Words of advocacy and persuasion are not criminal and the 1948 Selective Service Law was unconstitutional in attempting to proscribe petitioner's advice and counsel.

3. Petitioner, as a father, has a right to advise his son on matters of morals, religion and education and such advice constitutes no crime.

4. A person whose religion holds that all war and preparation for war, including registration for Selective Service, are evil cannot be made guilty of a crime for stating and advocating his religious beliefs.

5. The words of Dr. Warren are protected by the First Amendment to the Constitution as "free exercise" of religion and as "free speech".

6. No "clear and present danger" is, or could be shown justifying the provisions of the 1948 Selective Service Law or the indictment and trial of petitioner.

7. The 1948 Selective Service Law is unconstitutional and in particular is unconstitutional as applied to this defendant.

8. The petitioner is guilty of no crime in that he lacks the necessary criminal intent. He thought his position morally right; he was compelled of God—a "force majeure"; he believed the Selective Service Law invalid and sought a "test case".

9. The indictment did not comply with the Federal Rules of Criminal Procedure. It was duplicitous, failed to negative exceptions, was amended at the trial and lacked a plain, concise and definite statement of the essential facts.

10. Requests for instructions embodying the above were improperly denied.

The Court of Appeals, Tenth Circuit, determined that the words "counsel, aid and abet" created a primary and not an accessorial offense; that Congress may conscript in time of peace; that normally a parent may entertain religious beliefs and teach these to his children but cannot counsel non-registration, for freedom to believe is absolute but freedom to act is not, and "a man may not excuse his practices that are contrary to law because of his religious beliefs"; that the freedoms guaranteed by the First Amendment are qualified by the war power to provide for defense; that intentionally violating a law was all the intent required; that an indictment in the words of the statute was sufficient.

The Court of Appeals misquoted the indictment, so as in part to cure it and inserted the word "urged" (his son) into the facts, without any justification in the record. This word became the key in its opinion. Other than this the Court paid no attention to the problem of "clear and present danger" and the distinction between "advocacy" and "incitement".

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 of the United States Code, Judiciary and Judicial Procedure, Title 28, ch. 646, Public Law 773 of the 80th Congress.

The judgment of the United States Court of Appeals, Tenth Circuit, to be reviewed was entered on October 31st, 1949 and appears in the record filed herewith.

QUESTIONS PRESENTED

1. Is the 1948 Selective Service Law and section 12 (a) thereof unconstitutional?

(a) As proscribing words of advocacy in addition to words of incitement, contrary to the decisions of this Court.

(b) As on its face violating the freedoms of speech and religion guaranteed by the First Amendment of the United States Constitution.

(c) As failing to meet the test of "clear and present danger" in affecting the rights under the First Amendment.

(d) As too indefinite and vague in its terms, particularly for a criminal statute interpreted as restricting rights under the First Amendment and as creating a new primary crime based solely upon words rather than acts when using the terms "counsels, aids or abets."

(e) As an enactment for federal universal military training in time of peace contrary to the United States Constitution, Art. I, Sec. 8; Art. II, Sec. 2.

2. Does petitioner's conviction unconstitutionally deprive him of due process in violation of Amendments 5, 6, and 8 of the United States Constitution?

(a) In finding him guilty under the terms "counsels, aids or abets" when his advice was not followed and no primary crime was committed.

(b) In denying to him the defenses of lack of criminal intent, invalidity of the indictment, self incrimination and improper denial of instructions.

REASONS FOR ALLOWANCE OF CERTIORARI

1. This case raises important questions of federal law which have not, but should be, settled by this Court.

(a) Advocacy of religious beliefs and practices which may, in the future, result in law violations.

The Circuit Court has here voiced one of the most dangerous doctrines in American history—that a father, teacher, minister, news editor, lawyer or layman who teaches or advises anything which may lead to violation of law is himself guilty of a crime. (There is a general "counsel, aid and abet" statute in the federal law, 18 USCA 550.) If that be the law then the First Amendment is meaningless and the hundreds of cases protecting civil rights decided by this Court are mere printer's type.

In *Musser v. Utah,* 333 U. S. 95, three possible approaches to this problem were outlined:

> "In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting only the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda. Or we might permit advocacy of lawbreaking, but only so long as the advocacy falls short of incitement. But the other extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment."

Three justices were clear that individuals could teach and counsel polygamy, even though polygamy was a crime. Other justices had earlier stated this view, *Whitney v. California,* 274 U. S. at 376. The majority in *Musser v. Utah,* left this question open finding it possible to remand

to the State Court on the ground that the criminal statute there involved might be too indefinite.

In the dissents in *Terminiello v. Chicago,* 337 U. S. 1, Chief Justice Vinson and Justices Frankfurter, Jackson and Burton, who had constituted the majority in *Musser v. Utah,* seemed to forecast the adoption of this same position in distinguishing between "fighting words" and mere advocacy. The right to advocate, though not to incite to immediate criminality, would seem to be consistent with this Court's repeated view.

(1) *Herndon v. Lowry,* 301 U. S. 242 and earlier cases.
(2) *Bridges v. California,* 314 U. S. 252.
(3) *Chaplinsky v. New Hampshire,* 315 U. S. 568.
(4) *Taylor v. Mississippi,* 319 U. S. 583.
(5) *Winters v. New York,* 333 U. S. 507.
(6) *United States v. C.I.O.,* 335 U. S. 106.
(7) *Terminiello v. Chicago,* 337 U. S. 1.

And consistent with the "clear and present danger" doctrine which is generally viewed as growing from "attempts and incitements."

Chaffee, *Free Speech in the United States* (1941) citing the early opinion by Holmes in *Commonwealth v. Peaslee,* 177 Mass. 267 (1901), an attempt case.

Brandeis, *J.,* in *Schaefer v. United States,* 251 U. S. 468, 486: "But as this court has declared * * * the test to be applied—as in the case of criminal attempts and incitements—is not remote or possible effect. There must be a clear and present danger."

(b) Interpretation of sec. 12 (a) of the Selective Service Law of 1948.

If the term "counsels, aids or abets" is interpreted as defining the crime of accessory, the petitioner cannot be found guilty for it is conceded that his son registered, and the primary crime never occurred. There is an unbroken line of authority, to which counsel has been unable to find

a single exception, that these terms only define an accessorial crime and that the above rule must be applied.

The interpretation of section 12 (a) becomes even more important when it is realized that the interpretation of the Court of Appeals creates a new crime committed by words only, and having no relation to the areas of "word crimes" heretofore judicially recognized: libel and slander, blasphemy, obscenity, reviling an officer, fighting words.

(c) Conscription in time of peace.

This Court has never defined the power of Congress relating to the training of manpower in time of peace. Nor has it determined when peace exists for this purpose—whether at the time when war ends by "unconditional surrender", or only when a peace treaty is signed, or only after proclamation of the end of the war by the executive and/or legislature. Manley O. Hudson in "The Duration of War Between the United States and Germany," 39 Harv. L. Rev. 1020 suggests all of these, and more. This Court in *Meyer v. Nebraska,* 262 U. S. 390, 402 protected rights under the First Amendment violated before the official termination of the war on the theory of being "in time of peace." In *Jacob Ruppert v. Caffey,* 251 U. S. 264, five judges felt that the armistice did not end the war, four that it did. In *Ludecke v. Watkins,* 335 U. S. 160, and in *Woods v. Cloyd W. Miller Co.,* 333 U. S. 138 this Court upheld the Housing and Rent Act of 1947 and the removal of an alien enemy under the war power. But four justices then thought the concept that we were still at war "pure fiction", at least two others recorded their opposition to judicial abnegation of the right to review the question, and all were fearful of extending the war power beyond the remedying of maladjustments from the war. At some point,

in some country, man must rescue his freedoms, his religion, his morals from the grip of war. In America, is the time *now?*

Here we are presented with the first conscription act in American history not adopted during armed conflict or in immediate preparation therefor. This Court has expressly reserved the question of the constitutionality of such act:

> "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace." *Hamilton v. Bd. of Regents,* 293 U. S. 245, 265.

(d) Definition of criminal intent.

The District Court and Court of Appeals employed the old general rule of criminal intent, e. g. *Ellis v. United States,* 206 U. S. 246, that intentionally adopting conduct which a person knows is forbidden is the "only sense in which the law ever considers intent." Such statement of intent is recognized by this Court to be inadequate *(Keegan v. United States,* 325 U. S. 478; *Fisher v. United States,* 328 U. S. 463; *Screws v. United States,* 325 U. S. 91).

Petitioner stated three bases for lack of criminal intent and capacity: (a) the moral rightness of the action taken ("there are few finer or more exalted sentiments than those which find expression in opposition to war." 283 U. S. at 621); (b) that petitioner was compelled of God, by a "force majeure", and was not a free agent; (c) that under *Keegan v. United States,* a person can legally counsel non-registration in order to raise a "test case" of the constitutionality of all or part of the 1948 Selective Service Law.

2. The decision of the Court below is in conflict with the applicable decision of this Court.

(a) The court made no attempt to apply the clear and present danger test and if the test were properly applied neither the statute nor the conviction here involved could be sustained.

If recruiting members for the Communist party, (Herndon v. Lowry), if publicly advocating polygamy (Musser v. Utah), if playing anti-Catholic records in streets where 90% of the people were Catholic (Cantwell v. Connecticut), if condemning the war and draft and distributing literature to this effect to parents of draftees during the war (Taylor v. Mississippi), if refusal to salute the flag during the war when great national solidarity was sought (West Virginia v. Barnette) do not show a clear and present danger, how can Dr. Warren's privately counselling his son, particularly when the son did register, present that clear and present danger required? How has the draft law been impaired? The father had notified the Department of Justice what he had done; their investigations showed no effect to his words. Had they not wanted to hound a citizen into court as an "example" to break the cause of pacifism, no one would ever have known of, or been affected, by, Dr. Warren's words.

Assume that Dr. Warren's son had followed his advice, had gone to his local board but refused to sign his name to his draft card (i. e., *to* register. This is the procedure of most conscientious objectors whose religion prevents them from doing an affirmative act toward war and is consistent with the father's letter to the Department of Justice.) The statute merely requires a person to "submit to registration", *not "to* register." The regulations clearly recognize that even if the boy did not go to the board, "he shall be registered", (his) "form shall be filled out by

a member or clerk", "a member or clerk shall sign such man's name" "and such registrant shall thereby be registered." (Reg. 613.3, 642.31). Where, to a government possessing all these powers is the "clear and present danger?" Where to a government that was calling up no one under the act was the "clear and present danger?" If the son were sufficiently affected by the father's religious teaching not "*to* register" he would surely be a conscientious objector whom the statute excuses from military service. Where is the clear and present danger to a government which will not use the man, to make him offer a "pinch of incense" to Caesar to show that his religious will is broken?

(b) Free exercise of religion guaranteed by the First Amendment is, in many cases, a defense to criminal prosecutions.

The Court below squarely states: "A man may not excuse his practices that are contrary to law because of his religious belief." This sets at naught decisions of this Court such as *West Virginia v. Barnette, Taylor v. Mississippi, Cantwell v. Connecticut,* and many others. It, at best, represents a restricted group of decisions—the polygamy and human sacrifice cases—*Reynolds v. United States,* 98 U. S. 145, *Davis v. Beason,* 133 U. S. 333. It should be noted that these cases involved three elements not present here, and these have been referred to by this Court as distinguishing features: (1) all these acts are affirmative (2) resulting in harm to specific persons other than the state and (3) contrary to civilization and the basic religious culture of our society.

The Court below supports its rule by a distinction between beliefs (free) and acts (restricted) which rewrites the First Amendment which guarantees the free *exercise* of religion, and never mentions "beliefs".

The Court below relies largely on *United States v. MacIntosh*, 283 U. S. 605. It was our understanding that when this Court in *Schneiderman v. United States*, 320 U. S. 118, referred at least six times and "agreed to" the dissents of Chief Justice Hughes in the *MacIntosh* case and of Justice Holmes in the *Schwimmer* case and quoted extensively therefrom, it was accepting the dissents as the proper statement. And this became even more clear when the Court reversed the *MacIntosh* case in *Girouard v. United States*, 328 U. S. 61, and said, 68-9:

> "* * * The struggle for religious liberty has through the centuries been an effort to accomodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognized that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle."

An analysis of the amendment drafts, debates, and publications at the time of the adoption of the First Amendment (partially reviewed in 333 U. S. 203) will show that full rights of conscience were protected and this Court has used the term "rights of conscience" as equivalent to religious rights (335 U. S. 106, 140).

This Court has frequently stated that the First Amendment embraces the rights to believe, practice, teach. It has denied the power to "force him to profess a belief *or disbelief* in any religion." (333 U. S. 203, 210).

This Court has several times referred to the violations of law by Quakers and others because of religious beliefs as what produced the First Amendment. It is hoped that practices of two hundred years ago will not be commended

and the same practices today be punished. In 1948 a national conference of Quakers adopted and published a statement of position:

> "* * * Friends are exhorted to adhere faithfully to this testimony against all wars and fighting, *and in no way to unite with any warlike measure such as a Selective Service Draft or Universal Military Training,* to the end that we may convincingly demonstrate a more excellent way of settling conflicts. * * * A living concern having been expressed that Friends' *practices be consistent with their professions,* Friends are urged:
>
> 1. To support Young Friends and others who express their *opposition to conscription either by non-registration,* or by registration as conscientious objectors. *We warmly approve civil disobedience under Divine compulsion* as an honorable testimony fully in keeping with the history and practices of Friends." (Italics supplied.)

Are Friends violating the Selective Service Law? If not, why is petitioner? Several hundred nationally known ministers issued a similar declaration. If they are not guilty, why is petitioner? Can any Quaker distribute the writings of George Fox, the founder of the Society of Friends and his declaration to Charles II that Friends "cannot learn war any more?" If they can, why can't this petitioner?

(c) Freedom of speech, as interpreted by this Court, protects the utterances of petitioner.

These are neither fighting words, seditious words, slander nor opprobrium turned upon officers. And above all they are not incitation to violence.

(d) The Court below has unconstitutionally restricted the petitioner's right as a parent in educational and religious upbringing of his son.

This is guaranteed to him by *Pierce v. Society of Sisters,* 268 U. S. 510, *Prince v. Massachusetts,* 321 U. S. 158, *Ever-*

son v. Board of Education, 330 U. S. 1, *People of Illinois v. Board of Education,* 333 U. S. 203. In *Hamilton v. Board of Regents,* 293 U. S. 245, 262, and in *Gilbert v. Minnesota,* 254 U. S. 325, 335-6, the very right to teach conscientious objection is stated.

(e) The Court below gave no consideration to the presumption of unconstitutionality of a statute, which, on its face, as directly and injuriously affects freedom under the First Amendment as does Section 12(a).

(f) Section 12(a) of the 1948 Selective Service Law was invalid as a criminal law too indefinite under the decisions of this Court.

Aside from the uncertainty whether the words "counsels, aids and abets" define a primary or accessory crime, as already mentioned, the statute is so indefinitely drawn as to offer no standard of the lawful and the unlawful. One is not to counsel, aid or abet another "to refuse or evade registration or service *in the armed forces*". But a conscientious objector neither registers nor serves in the armed forces. One is not to counsel, aid or abet another "to refuse or evade * * * any of the requirements of this title, or rules, regulations, or directions". But the statute requires *submission* to registration *not* "*to* register" as the indictment charged. And the regulations recognize the rights of a man who will not sign his name ("register"). The words "*refuse* or *evade* registration" would seem to be passive, not active, and show no requirement "to register". In a statute not shaped as an espionage act aimed at words, and with an espionage act already in force, it would seem wise to restrict this act to drafting manpower and not policing speech with five year sentences and $10,000 fines.

(g) The war power constitutes no exception to the rules applied in testing whether or not there has been an unconstitutional infringement of civil liberties.

The reliance on the war power by the Court below disregards decisions of this Court. *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281; *Hamilton v. Kentucky Distilleries*, 251 U. S. 146, 156.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the Tenth Circuit, sitting at Denver, Colorado, commanding that Court to certify and to send to this Court, on a day certain to be herein named, a full and complete transcript of the record and all proceedings had in this case numbered and entitled on its docket 3921, to the end that this case may be reviewed and determined by this Court; that the said judgment of the United States Court of Appeals for the Tenth Circuit may be reversed by this Court; and that your petitioner may have such other and further relief in the premises as may seem just and proper.

WIRT A. WARREN,
Petitioner.

HARROP A. FREEMAN,
and
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Ithaca, New York,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF THE PETITION

Opinion Below

The opinion of the United States Court of Appeals for the Tenth Circuit was entered October 31st, 1949, and is printed at pages 83-91 of the Record.

Jurisdiction

The grounds on which jurisdiction of this Court is invoked are set forth in the Petition at page 4.

Statement

The Statement of the Case appears in the Petition at page 2, and, for brevity, is not repeated here.

Specification of Errors

The Court of Appeals erred in ruling against petitioner on each of the issues stated at page 3 of the Petition. These will not be repeated. See further, questions presented, page 5 of the petition.

Statutes Involved

The pertinent provisions of the 1948 Selective Service Law and the regulations thereunder are set forth at the end of this Brief.

ARGUMENT

Because of the number of cases which had to be cited in the Petition for certiorari and the legal distinctions there made to show that important federal questions are raised which have not, but should be, settled by this Court and that the decision of the Court of Appeals is in conflict with applicable decisions of this Court, such discussion will not

be repeated in this Brief. Nor will the Brief be expanded to present all the material of which this Court would want to be informed in deciding the issue after certiorari is granted. Therefore only five matters will be more fully treated here:

1. Section 12(a) of the 1948 Selective Service Law by the terms "counsels, aids or abets" defines the crime of accessory and Dr. Warren cannot be found guilty thereunder since the primary crime of evading or refusing registration was not committed.

2. The Courts below should have held that Section 12(a) of the statute is void on its face, and as construed and applied to the facts and circumstances of this case, because it unduly abridges the freedom of speech, contrary to the First Amendment to the United States Constitution.

3. A person whose religion holds that all war and preparation for war, including registration for a selective service law, are evil cannot be made guilty of a crime for stating or advocating his religious principles and section 12(a) of the 1948 Selective Service Law is on its face and as interpreted unconstitutional.

4. Petitioner has been deprived of due process.

5. The 1948 Selective Service Act is unconstitutional and in particular is unconstitutional as applied to this petitioner.

I

Section 12(a) of the 1948 Selective Service Law by the terms "counsels, aids or abets" defines the crime of accessory and Dr. Warren cannot be found guilty thereunder since the primary crime of evading or refusing registration was not committed.

Assume that petitioner *did* counsel the commission of a a crime. The facts are undisputed that the counselled son committed no crime. He registered. Petitioner can only

be convicted if the terms in section 12(a) "counsels, aids or abets another to refuse or evade registration" can be considered to define a new primary crime of "uttering words of counsel" without reference to whether the crime counselled was committed.

This Court has spoken sharply against such indirect creation of new crimes in *Winters v. New York*, 333 U. S. 507, 519:

> "The clause proposes to punish the printing and circulation of publications that courts or juries may think influence generally persons to commit crimes of violence against the person. No conspiracy to commit a crime is required. See Musser v. State of Utah, 68 S. Ct. 397, this Term. It is not an effective notice of new crime. The clause has no technical or common law meaning. Nor can light as to the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears."

It is even more objectionable to interpret words, whose meaning has long been fixed to the contrary, as creating a new "word crime" which has no relationship to slander, obscenity, blasphemy, reviling an officer or "fighting words".

The words "counsels, aids or abets another" have acquired a meaning from long usage, from the common law, and from other statutes, so as to become technical words, defining the crime of accessory and were so intended in section 12(a).

"There are no words in the law which have acquired a more definite and specific meaning than procure, advise and assist, as contradistinguished from the actual commission of a crime—the latter is the principal offense, the former only accessory." *United States v. Wilson*, (C. C. Pa.) 28 F. Cas. No. 16,730, Baldw. 78, 103, Circuit Court, E. C. Pennsylvania. April Term, 1830 at page 709 and 710.

The principal must exist. *U. S. v. Mills,* 32 U. S. 138; *Manning v. Biddle,* 14 F. (2d) 518 CCA.

A statute which read, "any person who wilfully or maliciously sets fire to or burns or causes to be burned or who *aids, counsels, or procures* the burning of any dwelling house, * * * shall be guilty of arson * * *" Maryland Code, 1935 Supp., Art. 27, Sec. 6, was held in *Wimpling v. State,* 189 A. 248, 252, 171 Md. 362 to embody the common law concept of accessory. In *People v. Phelps,* 15 N. Y. S. 440 the statute read, "any person who, with intent to thereby procure the miscarriage of a woman, * * * advises a woman to take medicine, drug, or substance, * * * is guilty of abortion." The Court said in part, "the question is presented whether that crime is committed by advice which is not acted upon * * * It seems to us that if they intended that abortion could also be committed by mere speech, followed by no act, they should have stated this unequivocally."

"Counsels" is coupled in the statute with "aids and abets" which are words of art denoting accessorial activity, and it is highly unlikely that "counsel" would be used with them unless it were used in the same sense. *State v. Haines,* 51 La. Ann. 731, 25 So. 372, where the usage is referred back as far as Blackstone. *Tillman v. Commonwealth,* 251 Ky. 73, 82 SW 2d 222; and under 18 USCA Sec. 550, *Van Patzoll v. U. S.,* 163 F. 2d 216.

The words "aids, abets, counsels" have consistently been held in federal statutes to define accessorial activities. Section 550 of Title 18 of the United States Code reads, "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission is a principal." It has been decided that 18 USCA Sec. 550 did not create any crime different from the common law

principles of accessory—of principal and agent. *U. S. v. Pritchard,* 55 F. Supp. 201, affirmed in *Waters v. U. S.,* 145 F. 2d 240; *Morgan v. U. S.,* 159 F. 2d 85; *Van Patzoll v. U. S.,* 163 F. 2d 216.

The reasoning of the Court below that a new crime was intended by section 12(a), since otherwise it would be mere duplication of 18 U. S. C. A. 550 (now 18 USC sec. 2), is not well founded. There are numerous other aider and abettor provisions in the federal statutes, duplicating 18 USCA 550, not interpreted as defining anything but accessorial crimes, *e. g.*:

Post Office—*U. S. v. Mills,* 32 U. S. 138.
Aliens—8 USCA 163.
Internal Revenue—26 USCA 2913, 2866, 2856, 3793.
Escape—18 USCA 752, 756, 757.

Construing words to have common law meaning has been one device which has saved penal statutes that would otherwise be held unconstitutional for vagueness. *Connolly, Commissioner et al. v. General Construction Co.,* 269 U. S. 385.

The total pattern of the Selective Service Act of 1948 requires that "counsel" be construed as requiring an actor who makes the counsel effective, by refusing to be registered. The purpose of the Selective Service Act was to mobilize national manpower. There was no effort on the part of Congress to cast the Act in the mold of a sedition act to punish "disloyal words". Only if the word "counsel" is construed as creating a crime accessorial in its nature will section 12(a) be consistent with the rest of the Selective Service Act, and effectuate its purpose.

II

The Court below should have held that Section 12(a) of the statute is void on its face, and as construed and applied to the facts and circumstances of this case, because it unduly abridges the freedom of speech, contrary to the First Amendment to the United States Constitution.

We have already pointed out the question left open by this Court as to a person's right to advocate lawbreaking in *Musser v. Utah.* That, we shall not repeat. But there is much history to prove that advocacy which falls short of incitement must be permitted. Free speech was not created by the First Amendment; it was recognized; and Congress was prohibited from "abridging" it. If there be a conflict between provisions in the main Constitution and this First Amendment, adopted to limit powers in the main Constitution, the amendment must control. Any other interpretation of "amendment" is meaningless. This Court has never as specifically stated the rule as above, but it is believed this is the major basis for its treating the rights guaranteed by the amendments as in a "preferred position". This republic originated in a statement of the right to change government. The founders utilized free speech so that they could "let facts be submitted to a candid world" and "declare the causes which impel them" because of their "decent respect to the opinions of mankind" in the *Declaration of Independence.* This is the tradition recognized in all the free speech, free press, free religion cases—characterized by Justice Holmes' famous "truth in the market place" statement. We shall not labor this history to the Court again. We shall utilize the concurring opinion of Justices Brandeis and Holmes in *Whitney v. California,* 274 U. S. 357, 375-77, as a classic statement of the position against which to test the restrictions here imposed.

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed
* * *

"* * * Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of lawbreaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incite-

ment, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

"Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion."

This and the familiar dissents of Justices Holmes and Brandeis in *Abrams v. United States,* 250 U. S. 616, 630; *Schafer v. United States,* 251 U. S. 493; *Pierce v. United States,* 253 U. S. 239, 269, 273; *Gilbert v. Minnesota,* 254 U. S. 325, 336, have become the law and been applied, given content and broadened by this Court in all the First Amendment cases of the last fifteen years.

Free press, e. g.:

United States v. C. I. O., 335 U. S. 106.
Winters v. New York, 333 U. S. 507.
Pennekamp v. Florida, 328 U. S. 331.
Bridges v. California, 314 U. S. 252.

Free Speech, e. g.:

Thomas v. Collins, 323 U. S. 516.
Taylor v. Mississippi, 319 U. S. 583.
Thornhill v. Alabama, 310 U. S. 88.
Herndon v. Lowry, 301 U. S. 242.

Free Religion, e. g.:

Everson v. Board of Education, 330 U. S. 1.
West Virginia v. Barnette, 319 U. S. 624.
Cantwell v. Connecticut, 310 U. S. 296.

We may well repeat the most recent words of this Court in *Terminiello v. Chicago,* 337 U. S. 1, 4-5, where any diversity in the Court did not relate to this rule stated:

> "The vitality of civil and political institutions in our society depends on free discussion. As Chief Justice Hughes wrote in *DeJonge v. Oregon,* 299 U. S. 353, 365, it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.
>
> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with things as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, * * *, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. * * * There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups."

This position has been the polar star in our political theory. The Office of War Information in its wartime pamphlet, "The United Nations Fight for the Four Freedoms", summarizes American theory well:

> "To live free a man must speak openly; gag him and he becomes either servile or full of cankers. Free government is then the most realistic kind of government, for it not only assumes that a man has something on his mind, but concedes his right to say it. It permits him to talk—not without fear of contradiction, but without fear of punishment * * *

> "In America, free speech and a free press were the first things the minds of the people turned to after the fashioning of the Constitution * * *
>
> "Talk founded the Union, nurtured it and preserved it. The dissenter, the disbeliever, the crack-pot, the reformer, those who would pull down as well as build up—all are free to have their say. Talk is our daily fare—(citing the ladies' tea, editor, professor, minister, and many others) * * * The enemies of all liberty flourish and grow strong in the dark of enforced silence."

We should ponder the opposition of a Dr. Warren to the militarization of his country in the light of Laski's keen observation on liberty (*Liberty in the Modern State*, p. 80):

> "The secret of liberty is courage. A certain penumbra of contingent anarchy always confronts the state but this is entirely desirable since the secret of liberty is always, in the end, the courage to resist."

The basic political philosophy of free discussion is given further expression in the two legal rules of thumb: (1) the clear and present danger test and (2) the presumption of unconstitutionality of statute or action infringing the First Amendment freedoms. It is unnecessary to labor these rules. The first is recognized as preventing a legislature from adopting a law, or any administrative action from being taken, which restricts any of the liberties guaranteed by the First Amendment, unless danger to paramount interests is so clear, serious and imminent that no other way, not restrictive of those rights, can be found to protect those paramount interests. The breadth of the rule can be gathered from *Bridges v. California*, 314 U. S. 252, 263 wherein the court was protecting the rights of an unpopular alleged communist:

> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be *extremely serious* and the degree of *imminence extremely high* before utterances can be

punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. *They do no more than recognize a minimum compulsion of the Bill of Rights.* For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" (Emphasis supplied.)

Robert Cushman, the recognized authority on Civil Liberties and "Clear and Present Danger" in *Essays in Political Theory* (Cornell Univ. Press, 1948), devotes a chapter to " 'Clear and Present danger' in Free Speech Cases." He points out that the Supreme Court makes use of the test in three ways:

"*First,* in five important cases decided since 1940 the Court has applied the clear and present danger test, as it did in the Schenck case, to determine whether particular speeches or publications actually constituted forbidden acts or conduct."

Second, cases where "The Court applied the clear and present danger test as a 'rule of reason' " in striking down convictions and protecting acts or speech under the first Amendment without holding the statute invalid.

"*Third,* beginning in 1940, the Court in several cases has used clear and present danger as a test of the validity of statutes themselves, rather than a test of the validity of their application to concrete situations. In each of these cases the Court held the questioned statute bad."

Professor Cushman then goes on to outline the steps by which this advanced doctrine of "clear and present danger" has developed:

"The steps by which this has come about may be traced as follows: *First,* by the nineteen-twenties the American judicial mind, and especially that of the Supreme Court had been fully won over to the doctrine

that legislative exercises of the police power must be presumed by the courts to be valid, and should be upheld as long as the question of their validity is reasonably debatable * * *.

"*Second*, the mounting volume of legislation aimed at the suppression of various kinds of minority opinion and its expression soon placed the liberal-minded judge in a most uncomfortable dilemma.

"*Third*, the Supreme Court has recently extricated itself from this dilemma by a bold stroke. It has announced that the four great guarantees of civil liberty in the First Amendment, freedom of speech, press, religion, and assembly, are more important to our democracy than are other parts of the Constitution. They occupy a *preferred* place in our scheme of constitutional values. Therefore, a statute passed in the exercise of the police power, or any other power, which *on its face* appears to restrict any one of these four great civil liberties will *not* be presumed to be constitutional. On the contrary, it will be presumed to be *unconstitutional*, and the burden of proof will rest squarely upon the shoulders of those who defend it.

"*Fourth*, in order to assume successfully the burden of proof imposed by this presumption of invalidity, the Court insists that it must be clearly shown that some clear and present danger to the security or welfare of the state or nation demands the restrictions which the legislature has placed upon any of the four freedoms protected by the First Amendment."

Though Justice Frankfurter has dissented from the full application of the "preferred position" argument (*Kovacs v. Cooper*, 336 U. S. 77) it must be taken as generally accepted that some preference and therefore a presumption against legislation infringing these freedoms is the present rule.

United States v. C. I. O., 335 U. S. 106, 145.
Kovacs v. Cooper, 336 U. S. 77.
Thomas v. Collins, 323 U. S. 516.
Thornhill v. Alabama, 310 U. S. 88.
Schneider v. New Jersey, 308 U. S. 147.
United States v. Carolene Products Co., 304 U. S. 144.

It is no answer in this case, that defense is a "paramount" interest. This Court has frequently recognized that all infringements on civil liberties will be made in the name of the most pressing, overriding public welfare. (Minersville District v. Gobitis, 310 U. S. 586, 604).

> "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man then that any of its provisions can be suspended during any of the great exigencies of government." *Ex parte Milligan*, 4 Wall. 2, 120.

We must bear in mind that in cases involving alleged violations of the First Amendment we are never restricted to the specific case. As this Court has many times pointed out: "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas (citing cases)", *Thornhill v. Alabama*, 310 U. S. 88, 97. If the statute covers expressions protected by the First Amendment as well as those which can properly be regulated, the statute is unconstitutional, *Stromberg v. California*, 283 U. S. 359, 369; *Herndon v. Lowry*, 301 U. S. 242, 258; *Winters v. New York*, 333 U. S. 507, 509. It is no answer that stautes in use for a long time or affecting many people or important processes are stricken down. In *Winters v. New York* a New York statute in effect sixty years and statutes in 24 other states were upset. Nearly all states embodied the practice stricken in *West Virginia v. Barnette*. The whole N. R. A. collapsed with *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495.

In its broad aspects, the danger if the decision of the Court of Appeals in this case is allowed to state the law

lies in its almost unlimited restriction of free speech. Under it we, as law school professors, could not say in Taxation: "This tax appears to us unconstitutional and in the light of the difficulty experienced in obtaining refunds of AAA processing taxes, it may be wise for your client to refuse payment until validity is determined." We could not, in Constitutional Law, commend Taylor for violating the statute in 319 U. S. 583, or Thomas in 323 U. S. 516, and surely not commend Jehovah's Witnesses who continued to violate the flag salute laws between 310 U. S. 586 and 319 U. S. 624. We would not risk our necks in International Law class if we advanced Robert Jackson's argument at Nurnberg that no individual was protected from individual guilt by following the command of his government—if he knew the command morally wrong he should violate it. No minister could preach from the pulpit, "love your enemies", for, acted on, this is surely treason. Every one of these speeches advocate the breaking of law to a degree substantially equal to that of petitioner's words, as might also a doctor's advice or a newspaper editorial. In fact, cannot a judge's opinion upholding a person's right to violate the flag salute or similar law be cited by another lawbreaker as the motivation of his act?

Free speech is not merely a defense; it is an obligation. He who discovers defects in government and who, from fear of punishment by government, fails to combat those defects is like a watchman who fails to warn his wards of dangers seen only by him. The pacifist sincerely believes in his mission to warn of the militarization of government, to advocate a way of reconciliation and love to replace power and violence, to remove armies from international negotiations so that these may be conducted grounded on reason rather than right. He sees war and preparation for war as the greatest millstone about the neck of government (over ⅔ our taxes) and believes that only as more paci-

fism is adopted can the kingdom of heaven begin to come on earth. Is it so heinous to advocate these things?

There have been those who have urged that free speech protects abstract discussion but does not protect "solicitation to action". This Court has squarely held that "solicit" is included in free speech. After referring to the word "solicit" the Court said in *Thomas v. Collins,* 323 U. S. 516, 537:

> "But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. "Free trade in ideas" means free trade in the opportunity to persuade to action, not merely to describe facts. * * * Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given.
>
> "Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining labor unions are within the First Amendment's guaranty. *Labor Board v. Virginia Electric & Power Co.,* 314 U. S. 469. Decisions of other courts have done likewise. When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed. * * * But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection."

But in this case we are presented with more than the right of advocacy, more than the "cardinal principle of Americanism * * * free discussion of the problems of society" *(Pennekamp v. Florida,* 328 U. S. 331, 346), more than the presumption of unconstitutionality of restrictions on free speech, more than a searching application of the

clear and present danger test; here the petitioner adds the sanctity of the family and the home. "It is not seriously debatable that the parental right to guide one's child intellectually and religiously is a most substantial part of the liberty and freedom of the parent, (citing cases)." *Pierce v. Society of Sisters,* 268 U. S. 510, 518.

Central to Anglo-American law is the concept that the family is a unit which for some purposes even the state cannot invade; in the long run the community will best be served by protecting family rights. In line with this, one spouse may not testify against another, a child need not turn over his criminal parent (or vice versa) to the law to avoid the charge of "harboring", a parent may choose to educate his child in non public or "religious" schools, a parent may counsel and teach his child not to salute the flag. These are but a few of the well known applications of the general principle.

So important is this that even at the time when 50 U. S. C. A. 33 made it a crime for any person to obstruct recruiting or enlistment, in *U. S. v. Nearing,* 252 F. 223, 230, now Circuit Judge Learned Hand said of the application of 50 U. S. C. A. 33 to a parent's counselling (in violation of the literal wording of the statute) non-registration, non-enlistment, etc.:

> "It will perhaps be asked if this includes all bona fide advice to an eligible not to volunteer, as, for example, by a wife or a father, on the score of duty. Obviously not. If an eligible asks advice of anyone, or if a gratuitous advised has an interest or duty to give advice, the law does not forbid him."

The law recognizes an obligation on the parent to educate his child and encourages him in providing instruction. But if a Catholic parent cannot counsel his son to refrain from meat on Friday, a Jewish parent cannot counsel as to the proper days of Sabbath observance, a Quaker parent can-

not advocate refusal of military service, a Jehovah's Witness parent cannot urge refusal to salute the flag—just because he may cause the child to violate a law—then the sanctity of the family and its educational and religious freedom are gone.

III

A person whose religion holds that all war and preparation for war, including registration for a Selective Service Law, are evil cannot be made guilty of a crime for stating or advocating his religious principles, and Section 12(a) of the 1948 Selective Service Law is on its face and as interpreted unconstitutional.

Amendment 1 of the United States Constitution protects not only beliefs but the "free exercise" (i. e. acts) of religion. All religions are composed of beliefs plus acts in furtherance of and in accordance with those beliefs. To urge, as it sometimes is, that a man is entitled to "freedom of religious belief" but not "freedom of religious action" is to rewrite the First Amendment. The word *belief* does not even appear in the Constitution; the expression used is "free exercise".

The preferred definition of "religion" given by Webster's New International Dictionary is: "*The outward act* or form by which men indicate their recognition of the existence of a God or gods having power over their destiny, to whom obedience, service and honor are due". The second definition from the same source is: "The feeling or expression of love, fear, or awe of some superhuman and overruling power * * * *by the conduct of life.*" The most frequently accepted definition in the law cases is: "religion is a term referring to one's views of his relations to his Creator and *to the obligations they impose.*" One

of the most scathing rebukes in religion is reserved for those who "believe" but fail to so act—"hypocrites."

As appears, *supra,* this Court has recognized the right to solicit to action as included in "free speech" even without the word "exercise" being annexed to free speech in the Constitution. How much more must action and counselling to action be protected in the realm of religion. From the earliest cases in this Court the First Amendment was stated to protect beliefs, teaching and practice, even when they seemed to violate law (*Watson v. Jones,* 13 Wall. 679, 728; *Church of the Holy Trinity v. United States,* 143 U. S. 457).

Most recently the full implications of religious liberty have been stated by this Court:

> "• • • the struggles for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle. As we recently stated in *United States v. Ballard,* 322 U. S. 78, 86, 'Freedom of thought, which includes freedom of religious belief, is basic in a society of freemen. *Board of Education v. Barnette,* 319 U. S. 624.' The test oath is abhorrent to our tradition.'* *Girouard v. U. S.* 328 U. S. 61, 68.

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* A word needs to be said about this "test oath." Art. VI, cl. 3 of the Constitution provides "no religious test shall ever be required as a qualification to any office or public trust under the United States." When this defendant is found guilty as charged and sentenced for a felony he automatically loses his civil rights including the right to public office. Therefore to interpret the 1948 Selective Service law so as to require him to do an act against his religious belief is to impose a religious test for public office as effectively as thought you said, "No person who is religiously opposed to militarism, war or preparation for war can hold public office." See *U. S. v. Lovett,* 328 U. S. 303 holding that the effect of action may make it constitutionally invalid as a bill of attainder.

It is submitted that this is the proper emphasis—that the State must accommodate itself to the conscience, that the First Amendment must be read in the light of history, that this father must be permitted to advocate and every father's son to follow the promptings of conscience. If religious liberty protects either the father in counselling or the son in refusing to participate in military preparation, how can petitioner be guilty?

We need, perhaps, to review a few facts. We could go step by step through the Old and New Testaments to show that Judeo-Christian religion has always maintained and practiced duty to the law of God as paramount to the law of man. The first three chapters of Genesis tell the story of Adam and Eve—what occurs when man violates the will of God. (Genesis 1-3). In the first two chapters of Exodus is the law of Egypt requiring the drowning of every male child and the record of how the parents of Moses broke the law and hid him in the bullrushes (Exodus 1-2). Jesus' parents broke a law in fleeing with him to Egypt (Matt. 2:13, Luke 2:39). The breaches of law by Jesus are well known: teaching publicly on the Sabbath (Matt. 4:13, Luke 4:16. John 7:11), healing on the Sabbath, (John 5:1, Matt. 12:9, Mark 3:1, Luke 6:6, John 10:1, Matt. 19:12, Mark 10:1, Luke 13:10), plucking and eating corn (Matt. 12:1, Mark 2:23, Luke 6:1), not washing hands (Matt. 15:1, Mark 7:1). So also are Jesus' words: "Render therefore unto Caesar the things that are Caesar's and unto God the things that are Gods'." (Matt. 22:21, Mark 12:17, Luke 20:25). Two of the first acts of the disciples were breaches of the law producing arrests of Peter, John and Stephen and the words of Peter, "Whether it be right in the sight of God to harken unto you more than unto God, judge ye" (Acts 5, 6).

If there be any question but that "pacifism"—the substitution of love, even of enemies, for violence—was the center of the Christian religion, it can be dispelled easily. Jesus went to the cross to exemplify this way of life. The historians and theologians recognize that for the first three centuries the Christian Church was *completely* pacifist and martyrs died by the thousands for refusal to war or even render a "pinch of incense" to Caesar. (Cyprian and Lactantius, *Divine Institutes* vi 18, v 17-18; C. John Cadoux, *The Early Christian Attitude to War,* London, 1940; G. H. C. MacGregor, *The New Testament Basis of Pacifism,* New York, 1941). All through history Christians have been urged to forsake violence and cling to love and the individual who refused any participation in war has been recognized as the "good Christian." Quakers are one of the outstanding examples of this continuity of the central doctrine of Christianity. It is commonplace knowledge that the Quakers in Pennsylvania, the Mennonites, Brethren and thousands of others came to this country, in part, to escape conscription and pressed military service.

The position of Quakers on war and refusal to obey morally objectionable laws was well known prior to the Constitutional Convention. By 1673 the Governor and Council in Rhode Island were Quakers. Quakers in England violated and finally upset the Conventicle Act. The law violations by William Penn and his trial in 1670, incidentally establishing the right of juries to return a free verdict, are well known. Throughout the period 1650-1775 English Quakers refused to train for war or pay militia taxes. In the Carolinas by 1700 John Archdale, the governor was a Quaker and complete exemption of Quakers from military service appears as near the Revolution as in the law of 1771. Pennsylvania was governed by Quakers till 1756

when they withdrew rather than participate in military preparations required by England. Two-thirds of the states grant exemption from militia duty to religious objectors. And so we might go on in more detail.

A typical Quaker "minute" during the Revolution read:

> "We, the people called Quakers, ever since we were distinguished as a Society, have declared to the world our belief in the peaceable tendency of the Gospel of Christ, and that, consistent therewith, we could not bear arms, nor be concerned with warlike preparations."

When, in 1775, the Committee of Safety of New York asked for a registration of all male inhabitants between the ages of sixteen and sixty, the Quakers refused to comply, on the grounds of a "truly conscientious scruple." Then the British Governor of New York applied to the Meeting for funds to provide stockings and other comforts for the troops. The Meeting declined to make the proposed gifts as "manifestly contrary to our religious testimony against war and fightings." William Rotch, a Quaker inhabitant of Nantucket and owner of the three ships which brought the famous cargo of tea to Boston in 1773, refused to sell bayonets, which had come to him in payment of a debt, but threw them into the sea. When court martialed, he explained his action thus:

> "As this instrument (the bayonet) is purposely made and used for the destruction of mankind and I cannot put into one man's hand to destroy another that which I cannot use myself in the same way, I refuse to comply with the demand."

The committee recognized his religious principles, and observed, "Then your principles are passive obedience and non-resistance." Rotch replied, "No, my friend, our principles are active obedience and passive suffering." And so the story might go on. (Much of this history is reviewed

in a pamphlet, *Quakers and Peace,* by Ruth S. Freeman; Joseph Besse, *A Collection of the Sufferings of the People Called Quakers.* This Court has several times referred to various Quaker violations of law as productive of the First Amendment: 330 U. S. 1, 10-11; 319 U. S. 624, 633.)

Certainly the framers of the Constitution knew of the religious claims of the dissident sects which refused to bear arms. The Convention met in Philadelphia, center of Quakerism. Two years earlier the Commonwealth of Virginia had led the way by granting full religious liberty. "This act was brought about by the combined influence of the dissenters (Presbyterians, Baptists, Quakers, etc.), who formed at that time two-thirds of the population, and the political school of Jefferson." Washington had experience in the French wars with Quakers who "chose rather to be whipped to death than to bear arms, or lend us any assistance whatever upon the fort, or any thing for self-defense," until Washington finally had to release them. Upon his inauguration Washington recognized the Quakers as most "exemplary and useful citizens * * * except their declining to share with others the burden of the common defence." Religious tests for office were proscribed by the Constitution, and the right of affirmation instead of oath was inserted in deference to Quakers and similar sects who would not take oaths. So well understood was this position that no discussion was necessary. In the State debates which produced the 1st Amendment specific reference to Quakers and similar sects was made. The states refused to ratify the Constitution unless a bill of rights was added; New York, Virginia, North Carolina, Rhode Island, New Hampshire and the minority in Pennsylvania being especially insistent on the protection of religious freedom. Soon after the 1st Amendment was adopted Aedamus Burke

spoke strongly against the federal or state governments requiring conscientious objectors to pay a fee for exemption because such legislation was "contrary to the Constitution." The exemption of "persons conscientiously scrupulous of bearing arms" was referred to as a recognized principle in the first congressional debate on the militia bill.

To continue this background it is desirable to study in some detail the facts surrounding the adoption of the First Amendment. The *Declaration of Independence* set the theory in the words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator, with certain unalienable rights • • • That to secure these rights, governments are instituted among men." Therefore, whether Natural Law is or is not sound Jurisprudence matters little. The theory of the relation of man and the State *in America* is that of Natural Law. Wherever you look for Natural Law, whether in Plato, Aristotle, Cicero, Aquinas, St. Germain, Suarez, Grotius, Burlamaqui, Blackstone, Bryce or Gierke, it is always the same:

> "We cannot be freed from its (nature's) obligations by senate or people." Cicero, *De Re Publica.*
>
> "Laws of this kind (unjust) must nowise be observed, because as stated in Acts v. 29, we ought to obey God rather than man." St. Thomas Aquinas, *The Summa Theologica.*

It is not therefore surprising in our decisions to find recognition of Natural Law and of conscience as higher than the State *(Girourard v. United States;* Corwin, "The Higher Law Background of American Constitutional Law," 42 Harv. L. Rev. 149). Any other concept would give the lie to the founding declaration: that citizens received these rights of God, that they created government to protect these rights.

There are two tendencies that show up in certain dicta in this Court which can be set right by reference to the period of adopting the First Amendment. One is that "religious liberty" and "conscience" are two different things and "conscience" is not "religion" protected. The second is dicta in *Hamilton v. Regents* 293 U. S. 245 that "conscientious objection" is not a constitutional right only one granted by legislative grace.

Religion was not mentioned in the original Constitution on the basis that the Federal Government should have no control over the subject (Elliot's *Debates,* III, 93, 204). When the Constitution was ratified by the states, New Hampshire requested an amendment (Elliot's *Debates,* I, 326):

> "Congress shall make no laws touching religion or to infringe the rights of conscience."

Virginia's ratification declared (Elliot's *Debates* I, 327)

> "that among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States."

and recommended an amendment to the Constitution (Elliot's *Debates,* III, 659); North Carolina made an identical declaration of rights (Elliot's *Debates,* IV, 244, 251; Rhode Island made a similar declaration (Elliot's *Debates,* I, 334):

> "20th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience * * *."

New York's ratification declared (Elliot's *Debates,* I, 328):

> "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience;"

Maryland and Pennsylvania proposed amendments but did not send them to Congress on the then popular theory that the Federal government possessed no powers over religion, why then an express reservation. The proposals read:

> *Pennsylvania:* "The right of conscience should be held inviolable and neither the legislature, executive or judicial powers of the United States shall have the power to alter, abrogate or infringe any part of the constitutions of the several states which provide for the preservation of liberty in matters of religion."
>
> *Maryland:* "* * * all persons be equally entitled to protection in their religious liberty".

We cannot review the attitudes of all Congressmen who adopted the First Amendment. We can examine those of Madison, most responsible for its adoption.

> "Madison was coauthor with George Mason of the religious clause in Virginia's great Declaration of Rights of 1776. He is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual."
>
> "Madison looked upon * * * religious freedom, to judge from the concentrated attention he gave it as the fundamental freedom." 330 U. S. 1, 34.

Madison was vexed "worst of anything whatever (because) there are at this time in the adjacent country not less than five or six well-meaning men in close jail for publishing their religious sentiments." I Writings of James Madison (1900) 18, 21.

Madison was the chief sponsor of Jefferson's Bill for Establishing Religious Freedom in Virginia, of which they declared:

> "* * * that the rights hereby asserted are of the natural right of mankind, and that if any act shall be hereafter passed to repeal the present or to narrow its operation, such act will be an infringement of natural right." 1 Randall, 220.

The fight for adoption was carried for nearly eight years until final passage in 1786. It still stands in the Virginia code (secs. 34-5) as a definition of "natural rights of mankind" and in part states:

> "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, * * *"

To induce the passage of this bill and the defeat of the Assessment bill, Madison issued his famous *Memorial and Remonstrances,* which states in part:

> "1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence.' The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate: this right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. "* * * if religion be exempt from the authority of the Society at large, still less can it be sub-

ject to that of the Legislative Body. The latter are but the creatures and viceregents of the former. Their jurisdiction is both derivative and limited. * * *

"* * * The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it, are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens. * * *

"* * * all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an '*equal* title to the free exercise of Religion according to the dictates of conscience'. Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man: To God, therefore, not to man, must an account of it be rendered." II Madison, 183-191.

On June 8, 1789 Madison introduced the first proposed amendments to the Federal Constitution. The fourth and fifth of these read:

(Annals, I, p. 434): "Fourthly, that in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. * * *"

(Annals. I, p. 435): "That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."

On June 8, 1789 (Annals, 1, p. 450) this draft was referred to the Committee of the Whole and on July 21st, upon the matter being again brought to the attention of the House by Mr. Madison (Annals, I, p. 660), the amendments were referred to a committee of eleven members, one from each state, Virginia being represented thereon by Mr. Madison.

On August 15, sitting as a Committee of the Whole, the House began consideration of the fourth proposition of the amendments reported by the Committee of Eleven, which read (Annals, I, p. 729):

> "Article 1, Section 9: Between paragraphs two and three insert 'no religion shall be established by law, nor shall the equal rights of conscience be infringed' ".

The Annals of Congress are unusually complete in their report of the debate (Annals, I, pp. 729-731):

> "Mr. Carroll,—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he said he was much in favor of adopting the words.
>
> "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit.

"Mr. Huntington * * * hoped, therefore, the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

"Mr. Livermore * * * thought it would be better if it were altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience. * * * the question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it."

At a later point Madison pled for the amendments:

"Have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury, were in jeopardy? That they ought not to adopt the Constitution until those important rights were secured to them?" (I Annals, 746.)

On August 17th the House considered what is now the Second Amendment (right to bear arms). It then read:

"A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms." (1 Annals, 749.)

Mr. Jackson and Mr. Smith proposed that the conscientious objector should provide a substitute.

"Mr. Sherman conceived it difficult to modify the clause and make it better. It is well known that those who are religiously scrupulous of bearing arms, are equally scrupulous of getting substitutes or paying an equivalent. Many of them would rather die than do either one or the other; but he did not see an absolute necessity for a clause of this kind. We do not live under an arbitrary Government, said he, and the States, respectively, will have the government of the militia, unless when called into actual service; besides, it would not do to alter it so as to exclude the whole of any sect, because there are men amongst the Quakers who will turn out, notwithstanding the religious prin-

ciples of the society, and defend the cause of their country. Certainly it will be improper to prevent the exercise of such favorable dispositions, at least whilst it is the practice of nations to determine their contests by the slaughter of their citizens and subjects.

"Mr. Vining hoped the clause would be suffered to remain as it stood, because he saw no use in it if it was amended so as to compel a man to find a substitute, which, with respect to the Government, was the same as if the person himself turned out to fight.

"Mr. Stone inquired what the words 'religiously scrupulous' had reference to: was it of bearing arms? If it was, it ought to be so expressed.

"Mr. Benson moved to have the words 'but no person religiously scrupulous shall be compelled to bear arms,' struck out. He would always leave it to the benevolence of the Legislature, for, modify it as you please, it will be impossible to express it in such a manner as to clear it from ambiguity. No man can claim this indulgence of right. It may be a religious persuasion, but it is no natural right, and therefore ought to be left to the discretion of the Government. If this stands part of the Constitution, it will be a question before the Judiciary on every regulation you make with respect to the organization of the militia, whether it comports with this declaration or not. It is extremely injudicious to intermix matters of doubt with fundamentals.

"I have no reason to believe but the Legislature will always possess humanity enough to indulge this class of citizens in a matter they are so desirous of; but they ought to be left to their discretion.

"The motion for striking out the whole clause being seconded, was put, and decided in the negative * * * 22 members voting for it, and 24 against it." (I Annals 750-751.)

On the same day:

"The committee then proceeded to the fifth proposition:

"Article 1, section 10, between the first and second paragraph, insert 'no State shall infringe the equal rights of conscience, nor the freedom of speech, or of the press, nor of the right of trial by jury in criminal cases * * *

"Mr. Madison conceived this to be the most valuable amendment in the whole list. * * *

"Mr. Livermore had no great objection to the sentiment, but he thought it not well expressed. He wished to make it an affirmative proposition; 'the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State.'

"This transposition being agreed to, and Mr. Tucker's motion being rejected, the clause was adopted." (I Annals 755.)

On August 20, 1789, (Annals, I, p. 766) the House resumed consideration of the amendments and on motion of Mr. Ames (Annals, I, p. 766) the fourth amendment, as the religious guarantee was then numbered, was altered so as to read:

"Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."

On the same day the right to bear arms amendment was again considered:

"Mr. Scott objected to the clause in the sixth amendment, 'No person religiously scrupulous shall be compelled to bear arms.' He observed that if this becomes part of the Constitution, such persons can neither be called upon for their services, nor can an equivalent be demanded; it is also attended with still further difficulties, for a militia can never be depended upon. This would lead to the violation of another article in the Constitution, which secures to the people the right of keeping arms, and in this case recourse must be had to a standing army. I conceive it, said he, to be a Legislative right altogether. There are many sects I

know, who are religiously scrupulous in this respect; I do not mean to deprive them of any indulgence the law affords; my design is to guard against those who are of no religion. It has been urged that religion is on the decline; if so, the argument is more strong in my favor, for when the time comes that religion shall be discarded, the generality of persons will have recourse to these pretexts to get excused from bearing arms.

"Mr. Boudinot thought the provision in the clause, or something similar to it, was necessary. Can any dependence, said he, be placed in men who are conscientious in this respect? Or what justice can there be in compelling them to bear arms, when, according to their religious principles, they would rather die than use them? He adverted to several instances of oppression on this point, that occurred during the war. In forming a militia, an effectual defense ought to be calculated, and no characters of this religious description ought to be compelled to take up arms. I hope that in establishing this Government, we may show the world that proper care is taken that the Government may not interfere with the religious sentiments of any person. Now, by striking out the clause, people may be led to believe that there is an intention in the General Government to compel all its citizens to bear arms.

"Some further desultory conversation arose, and it was agreed to insert the words 'in person', to the end of the clause; after which it was adopted * * *." (1 Annals, 766-767.)

No further change was ever discussed and it appears that the "conscientious objection clause" was omitted as a language revision, being covered by the First Amendment.

The amendments were adopted in the House on August 24. The Senate Journal of August 25, shows the then third amendment in the following language:

"Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed."

No record was made of the Senate debates discussing this amendment and no light has been thrown thereon by examination of the private papers of the Senators or of current newspapers and magazines. The lack of any such account of debate regarding the Third Amendment (now the First) is, however, itself significant in its implication that no heated contest developed regarding content and that form was the chief consideration involved in the change made by the Senate. The short period of time that the House proposal was before the Senate leads to the same conclusion. The Amendment was first considered by the Senate on August 25 (Annals, I, p. 71) and the Senate on September 9 (Annals, I, p. 77) amended it to read as follows (Records of U. S. Senate, September 9, 1789, U. S. National Archives):

> "Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition to the government for a redress of grievances."

Subsequently a committee of conference was appointed and thereafter within 15 days after the Senate revision, the committee had agreed on the language now found in the First Amendment and the House had on September 24, without discussion or debate, approved the conference committee's language (Annals, I, p. 913). The Senate approved this final version on September 25, 1789 (Annals, I, 88). Again it is obvious that it was not considered that the form in which it emerged from the conference committee had materially changed the intrinsic meaning.

A look at the constitutional provisions of the early states (mostly carried into present constitutions) is important.

Pennsylvania: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; * * * no human authority can, in any case whatever, control or interfere with the rights of conscience * * *"

North Carolina: "All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority should, in any case whatever, control or interfere with the rights of conscience."

Vermont: "That all men have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences * * * that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship."

Maryland: "* * * all persons are equally entitled to protection in their religious liberty; wherefore, no person ought, by any law to be molested in his person or estate, on account of his religious persuasion or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights * * *"

All but one of the other states used some form of the expression "conscience".

South Carolina, so far as we can find, used the same expression as in the Federal Amendment.

Rhode Island: "free to worship God according to the dictates of his own conscience."

New Hampshire: "Rights of Conscience:"

New Jersey: "agreeable to the Dictates of his own Conscience."

New York: "liberty of conscience".

Massachusetts: "agreeable to the dictates of his own conscience."

Delaware: "no power shall * * * interfere with, or in any manner control the rights of conscience."

Connecticut: "right to render that worship, in the mode most consistent with the dictates of their consciences."

Georgia: "right of conscience."

Virginia: "according to the dictates of conscience."

From all the above it is clear that the intention of the First Amendment was to completely protect freedom of *conscience* and conscientious objection to war was a well recognized, time honored expression of such conscience. This position finds recognition in Supreme Court decisions referring to "rights of conscience" or "freedom of conscience", (e. g. *United States v. C. I. O.,* 335 U. S. 106, 140, 144; *Thomas v. Collins,* 323 U. S. 516, 531; *Everson v. Board of Education,* 330 U. S. 1, 34), and disposes of any dicta in cases like *United States v. MacIntosh,* 283 U. S. 605, 624 and *Hamilton v. Regents,* 293 U. S. 245, 266 that conscientious objection is a matter of legislative grace.

There are a few allegedly "religious" acts, of quite a different quality from petitioner's position, which have been held *not* to be protected by the First Amendment—e. g. polygamy. *Reynolds v. U. S.,* 98 U. S. 145 (1878), *Davis v. Beason,* 133 U. S. 333 (1889), *Mormon Church v. U. S.,* 136 U. S. 1 (1889). But in those cases it is recognized that other acts claimed to be religious *are* protected by Amendment 1 from any interference (by criminal prosecution or otherwise). The Court attempted to state by way of dictum a few of the acts which may not be protected. These were "human sacrifice" and a wife burning herself on her husband's funeral pile. It will be noticed (1) that all these acts are affirmative, *i. e.* the allegedly religious person is trying to do an act, whereas in the instant cases

this petitioner asks that his son not be compelled to do an act, (2) that all result in harm to a specific person other than the state, and (3) that they would all be contrary to the basic Judeo-Christian culture of our society. The Court, in *Reynolds v. U. S.,* distinguished *Regena v. Wagstaff,* (10 Cox Crim. Cases, 531) where religious belief was a defense to manslaughter for not feeding a child on the ground that this was non-action (ours is also: non-registration or counselling non-registration) whereas the Mormon "offense consists of a positive act". The distinction between "positive" and "negative" is greater than mere semantics. To prevent a man from acting leaves his "belief" uncoerced; to make a man do an act contrary to his "belief" compels him to lie or appear to believe what is not in fact in his heart. To compel involuntary action is to coerce acts *and* beliefs.

In the second flag salute case *(West Virginia State Board v. Barnette,* 319 U. S. 624, 630), the Court made this distinction at the outset as the very basis of its decision, apparently to distinguish the polygamy, "human sacrifice" and similar cases:

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual * * * The refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual."

And again in the same case the Court said (p. 642):

> "* * * But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can pre-

> scribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

The dissent of Chief Stone in the first flag salute *(Gobitis)* case is equally forceful, 310 U. S. 586, 604.

> "I cannot say that government here is deprived of any interest or function which it is entitled to maintain at the expense of the protection of civil liberties * * * The guaranties of civil liberty are but guaranties of freedom of the human mind and spirit * * * They presuppose the right of the individual to hold such opinions as he will and to give them reasonably free expression * * * The very essence of the liberty which they guaranty is the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion. If these guaranties are to have any meaning they must, I think, be deemed to withhold from the state any authority to compel belief or the expression of it where that expression violates religious convictions, whatever may be the legislative view of the desirability of such compulsion. This seems to me so less than the surrender of the constitutional protection of the liberty of small minorities to the popular will."

The third distinction, that polygamy is contrary to the basic Judeo-Christian ethic of our society, but pacifism or opposition to all preparation for war is consistent with such ethic is recognized in the Mormon cases themselves, *e. g.* "The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World." *Mormon Church v. U. S.*, 136 U. S. 1, 49. Nowhere has the distinction perhaps been stated more concisely than in *State v. Woodruff*, 13 So. 2d 704, 705; in distinguishing the Mormon cases:

"Every system of law rests on a corresponding system of ethics that directs its course. The last-cited cases point this precept. We are committed to a free exercise of religious opinion but since our system of law rests on Christian ethics one would not be permitted to set up a harem and practice polygamy in Florida under the guise of religious freedom because polygamy is contrary to approved moral standards. If our law were predicated on Mohammedan ethics, the converse would be true. If it were predicated on pagan ethics I could sell my child as a slave and if predicated on still another system and I belonged to the sect known as Dukhoborrs, I would be permitted to traverse the highways nude under the guise of religion, but not so in our country because our system of moral teaching raises a different standard *that the law must conform to.* * * * A liberated conscience is as essential to a robust democracy as blood is to the human body. Enslave the conscience and democracy will perish as certainly as the body will perish when the blood ceases to circulate * * * Freedom of conscience is much older than the Declaration of Rights or the common law. Peter and John first invoked it when they were commanded by the high priest and the Roman rulers to speak and teach no more in the name of God. Acts 4:17-21. So the soil from which it springs like many other cherished precepts of the common law reach back to Hebrew origin and historically reveal why a free press, speech, and religion are in a preferred class, protected by the State and Federal Constitutions and immunized from charge by the State."

It is well in passing to point out that the Supreme Court in the *Girourard case* quotation, *supra,* and the Florida case, above, require law to accommodate itself to conscience rather than *vice versa.*

The *MacIntosh,* (283 U. S. 605), *Schwimmer* (279 U. S. 644) and *Bland* (283 U. S. 636) cases denying citizenship to conscientious objectors who refused to register a promise to bear arms have been overruled by *Girourard v. United States,* 328 U. S. 61 (1946) and the dissenting opinions in

those three earlier cases have now been quoted by the Court in the Girourard case and accepted as stating the correct principles. The parts quoted in the Girourard case are:

Chief Justice Holmes in the Schwimmer case:

"if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate * * * the Quakers have done their share to make the country what it is."

Chief Justice Hughes in the MacIntosh case, (283 U. S. 631):

"* * * the history of the struggle for religious liberty, the large number of citizens of our country, from the very beginning who have been unwilling to sacrifice their religious convictions, and in particular, those who have been conscientiously opposed to war and who would not yield what they sincerely believed to be allegiance to the will of God * * *"

Since the Mormon cases the Supreme Court has enunciated the "clear and present danger" test. Under this a whole series of acts have been protected as part of the religious liberty guaranteed by Amendment 1. Until the Court can confidently say in *Kovacs v. Cooper* (336 U. S. 77): "When ordinances undertake censorship of speech or *religious practices* before permitting their exercise the Constitution forbids their enforcement."

In this day when militarism threatens to engulf not only the individual but religion and the state we must be twice warned to protect religious freedom against militarism's inroads. To hold that the Constitution protects a man from being compelled to salute the flag, *West Virginia State Bd. v. Barnette,* 319 U. S. 624, (remotely related to religious belief) but does not protect him in refusing to par-

ticipate in war preparation (the central doctrine in Jesus' life) is to make mockery of this Court's word in that case:

> "But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Warren's case, though he is only an ordinary citizen, is as important to the world (and more important to America) as the Mindzenty and similar trials. All pose the question: where man's duty to his state leaves off and his duty to God takes over. It may seem to us that petitioner has chosen the wrong point. But we should be very cautious to allow him considerable latitude when we are clear that he is acting under Divine Compulsion. He and God may be right.

IV

Petitioner was deprived of due process of law.

The conduct of the trial, the presentation of the indictment and the denial of instructions, all deprived the petitioner of due process of law.

(a) Petitioner was deprived of the defense of lack of criminal intent and capacity, in violation of the due process of law clause.

It is elemental criminal law, statutory or common law, that a criminal intent or animus is required before a person can be convicted. There are at least three bases for saying that petitioner lacked criminal intent: (1) he thought his action was morally right, (2) he believed the Selective Service law invalid and sought a "test case" and (3) he was compelled by a "force majeure"—a power beyond himself and was not a free agent.

It is basic that until a person has capactiy to choose between a morally proper and morally improper act and selects the latter, he is not a criminal. This underlies all the law of youth, insanity, coercion and similar matters as defense. Not every killing is murder; not every taking is theft; not every branch of criminal law is a crime.

Although we might cite general cases or text treatments to illustrate the above principles, we shall use two cases on the defenses of religious hallucinations and fear, two under the 1940 Selective Service Law and a foreign case of a conscientious objector. Even if the Court views the defendant's religious views as unsound and "delusions" they prevent him being found guilty of a crime for they negative criminal intent. This is fortified in the particular crime charged and the statute under which that crime is alleged to arise by the use of words like "knowingly" and "wilfully".

Justice Cardozo, prior to going on the Supreme Court bench, clearly and scholarly summarized the rule and the historical basis as it related to murder and "insane delusions" in *People v. Schmidt,* 216 N. Y. 324, 330-337:

> "The jury was instructed in pointed and impressive terms, that even if the defendant believed in good faith that God had appeared to him and commanded the sacrifice of Anna Aumuller, and this belief was a delusion, the result of a defect of reason, the defendant must none the less answer to the law if he knew that it was wrong, in the sense that it was forbidden by the law of the state * * *
>
> "We are unable to accept the view that the word (wrong) in the statutory definition is to receive so narrow a construction. We must interpret the rule in the light of its history. The history has been often sketched. In the beginning of our law the madman charged with murder was not acquitted. A special verdict was given that he was mad, and the king par-

> doned him * * * then came the age of what has become known as the 'wild beast test' * * * The capacity to distinguish right from wrong was then put forward as another test. As propounded in these cases, it meant a capacity to distinguish right from wrong, not with reference to the particular act, but generally or in the abstract. Sometimes it was spoken of as the capacity to distinguish between 'good and evil' * * * Wrong was conceived of as synonymous not with legal but rather with moral wrong. Lord Mansfield told the jury in Bellingham's case: 'it must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature.' That became for many years the classic definition * * *
>
> "* * * A delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring moral distinctions as a delusion that God himself has issued a command. The one delusion is consistent with knowledge that an act is wrong, the courts have blended the elements of legal and moral wrong, but none, we believe, can be found in which the element of moral wrong has been excluded."

The test of intent applied by the lower court is almost exactly that condemned by the New York Court of Appeals—doing an act known to be proscribed by statute.

This is analogous to the many cases which have found no criminality in an act performed by one person under fear of her husband or other person, of which *People v. Jackerson*, 247 N. Y. 36, 42 could be taken as an example:

> "* * * The question of intent must always enter as an element of the crime. If Katherine and her brother George acted under fear and with no intent to aid or to participate in the commission of a crime, neither would be guilty of an offense known to the law."

Can a person who acts solely and exclusively in the belief that his God has commanded his act—be this delusion or sincere belief—be found to have criminal intent? Is

action "in fear of God" any the less involuntary and lacking in criminal intent than action taken in fear of man?

Holland does not have a "freedom of religion" provision in its constitution. Neither does it exempt conscientious objectors from military service. Therefore it might be expected to be more severe than the United States with a person who violated the military law. Fethus van Lieshout was charged with disobeying an order of his officer to don a uniform "on May 4, 1948, in time of war." He defended on the ground that as a conscientious objector carrying out God's will revealed through his conscience he could not participate in preparation for war or obey any law or order having that purpose. A Court Martial (not a civil court) acquitted him saying:

> WHEREAS the Court Martial is of the opinion, that if, notwithstanding the objections in question, the accused were yet to perform military service, he would act in serious contradiction with the compelling standards dictated to him by his conscience and that in these circumstances such a line of conduct cannot nor may be reasonably demanded of him;
>
> WHEREAS in view of the foregoing, the accused must be considered as having committed the act accepted above as proved, driven thereto by *force majeure* * * * and therefore not punishable and should be acquitted of that with which he is charged.
>
> PRONOUNCING JUSTICE IN THE NAME OF THE QUEEN: The accused is declared guilty of the act above proved * * * but is not declared punishable in respect thereof * * * and is acquitted. His immediate release is ordered.—As reported in Peace News and other papers, March 11, 1949.

But it is not merely this line of cases that stand in the way of a conviction. This man is a law abiding citizen. He desired not to violate any law; he did not attempt to evade this one or hide his position. He believed and hoped

that the Constitution and this statute would be so interpreted as not to require him to violate his religious belief. He seemed supported in this interpretation by the regulations adopted under the act, by law review articles and by case law. No such determination could be obtained without persons making "test cases." This he did. There are other cases holding that a person who violates or urges violation of law to pose a "test" case lacks the necessary criminal intent for conviction. There are two decided under the 1940 Selective Service Law which adequately illustrate the rule.

In *Keegan v. United States,* 325 U. S. 478, a member of the German-American Bund was prosecuted for violating the Selective Service Act in counselling evasion (refusal) of military service. Keegan did so counsel on the theory that when section 308 (i) of 50 U. S. C. took away the rights of Bund members to certain jobs this was unjust discrimination against American citizens rendering unconstitutional the application of Selective Service to them; the Bund wanted a *test case.* In part one of the typical publications said;

> "Every man, if he can, will refuse to do military duty until this law and all other laws of the country or the states which confine citizenship rights of Bund members are revoked.
>
> "We will fight to establish a precedent in this servile matter!"

In holding that an acquittal *should have been directed,* as requested, the Court in part said:

> "* * * One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, *may well counsel that the laws shall not be obeyed;* that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command."

The same principle was applied and the above Supreme Court case relied on in *Okamoto v. United States,* 152 Fed. 2d. 905. In this case Japanese-Americans who had been evacuated from the west coast into interment camps met and decided that they should not serve in the army under Selective Service, the theory being that while in custody of the government in these camps persons were not subject to Selective Service and that the law, if so applied would be unconstitutional. They sought a "test case". The Court held that it was error for the judge to charge;

> "* * * you are instructed that a desire to have a test case for that purpose does not excuse failure to comply with the selective training and service act."

In this case it was undisputed that one of the chief reasons the defendant counseled his step-son not to register was to test the constitutionality of the law which deprived this defendant of his God-given right to train and teach his step-son on matters which this defendant felt he was compelled to instruct his step-son—on matters of religion and conscience. It cannot be said that he had the necessary criminal intent when he sincerely counseled with his step-son on a matter of religious belief, and when he did nothing to evade the law and even told the Attorney General in a letter of the things he had done and why he felt compelled to do so and by his acts clearly took his position to create a "test case."

Since the crime with which the defendant is charged is counselling another to commit a crime it is essential that the one it is alleged was counselled must be one who had the present capacity to commit the crime counselled.

According to all the testimony the counselling occurred before the step-son was 18 years old and therefore before

he had any obligations with respect to registration. If he was not required to register under the Selective Service Act of 1948, then how could another be found guilty of counselling violation of the law which he was not required to follow? The statute might have been repealed before the son became 18; it might have been held unconstitutional, or the son might have died.

The Selective Service Act of 1940 used the same words as the present Act namely, "knowingly counsels, aids, or abets". In a case arising under the 1940 Act Mr. Justice Black said in his concurring opinion in *Keegan v. United States*, 325 U. S. 478, 89 L. Ed. 1745, "The prosecution tried to prove that the defendants counseled the members of the Bund to evade the Selective Service Act. Its case necessarily rested upon the assumption that members of the Bund were subject to the draft under that Act. It follows that if Bund members were not lawfully subject to draft under the Act, no person could be convicted for advising Bund members to this effect."

The indictment charges counselling on or about October 23, 1948, which was after the boy was 18 but the proof only shows counselling before he was 18. How can the defendant be "guilty as charged in the indictment"?

In point I we have shown that the statute here did not cover mere attempts. But even if it did, the defendant could not be found guilty where the son was under 18. Thus it has been held that where abortion involves a child which has "quickened" there can be no "attempt" prior to that time (State v. Cooper, 22 N. J. L. 52 and similar cases).

(b) The Court erred in overruling defendant's motion for dismissal of the indictment and for the discharge of the defendant since the indictment does not comply with the federal rules of criminal procedure.

We are not here referring to technicalities or discrepancies unprejudicial to the defendant. We cite only those which strike at the heart of the defendant's constitutional rights under the United States Constitution Amendments 5 and 6.

The indictment was not "a plain, concise and definite written statement of the essential facts constituting the offense charged" as required by rule 7(c) of the Federal Rules of Criminal Procedure.

Even under liberalized practice every essential fact must be stated with sufficient clarity that the Court and defendant can tell whether a crime and what crime is charged and so that if a conviction or acquittal results no chance of misconstruing what was decided can result and so that the defendant can plead the first case as a bar to similar act in a second case. Defendant's requested instruction No. 10 found at page 9 and following of the printed record points out the essential facts which are missing from the indictment. The conclusion of the indictment that "Walter Dean Murrah, *who was required to register*" avoids the requirement of pleading all the essential facts; a conclusion, inference or *recital* is insufficient. (Harris v. U. S., 104 F2d 41, C.C.A.Mo. 1939; U. S. v. Minnec 104 F2d 575, Cert. Den. 308 U. S. 577).

One fact which must be pleaded was that Murrah was 18 years old at the time counseled. The proof is clear he was *not* 18 when counseled. The indictment sets out October 23, 1948, as the date of the violation, yet the evidence shows no counseling at that time. Where the crime of

abortion depends on the quickening of the child; where incest requires nearness of relation; where rape requires a female; where the crime can only be committed on Sunday, these essential facts must be alleged and proved. And where time or place or characteristics of a person or a thing are elements of the crime they must be alleged and proved; e.g. that the record allegedly forged was a government record (Harris v. U. S. *supra)* see also Heitman v. U. S., 5 F2d 887.

An indictment in Federal Courts must be strictly construed. Conclusions of law alone are not sufficient. The essential facts must all be alleged. U. S. v. Cruikshank, 92 U. S. 542, 557, 559, 23 L. ed. 588; U. S. v. Philadelphia & R. Ray Co., 232 F. 953, 955; U. S. v. El Paso and N.E.R. Co., 178 F. 846 and many other cases. It is insufficient to plead the offense in the words of the statute when the statute is, as the Selective Service Law of 1948 here involved, general in its terms. U. S. v. Greene, 115 F. 343; Lowenburg v. U. S., 156 F2d 958, cert. den., 67 S. Ct. 865. The predecessor section to 12(a) of the 1948 Draft Law, which was much more specific than section 12(a) has been held too general to permit pleading in the words of the statute. Foster v. U. S., 253 F. 481.

The indictment and the evidence failed to aver or show that Walter Dean Murrah and the defendant were not within the exceptions set forth in the Selective Service Act of 1948, without which averment and proof defendant's acts could not be found criminal.

Section 3 and Section 4 (a) of the Selective Service Act of 1948 both begin with the words "Except as otherwise provided in this title"; and Section 12, here involved, contains exceptions. The general rule is that the government is bound to allege and prove that the defendant is not within any of the exceptions. Westmoreland v. U. S., 155

U. S. 545; Wheeler v. U. S., 159 U. S., 523; Reing v. U. S., 84 F2d 624; Rose v. U. S., 149 F2d 755; Hale v. U. S., 89 F2d 578; Weare v. United States, (CCA8) 1 F2d 617, 620; U. S. v. Cook, 17 Wall. 168, 174, 21 L. ed. 538; Ledbetter v. U. S., 170 U. S. 606, 611, 18 S. Ct. 774, 42 L. ed. 1162; and others.

Thus in Sugar v. U. S., 252 F. 74 in an indictment charging failure to register as required by the Selective Draft Law, the proper method of pleading was held to be to allege that accused was a male between ages of 21 and 30, not an officer or enlisted man, not in the National guard or Reserve Corps and was not in any manner exempted or excused from registering. The indictment herein fails to show that the defendant was not within the exceptions set forth in the enacting clause of the Selective Service Act of 1948.

The indictment is invalid for duplicity in charging several separate and distinct offenses in one count of the indictment and the proof, instructions and verdict carried out this duplicity; thus not permitting the proof or disproof of the charges for which the defendant was found guilty.

The section of the statute which defendant is claimed to have violated contains at least twelve offenses by combining a series of three and two series of two offenses each by the word "or". There are thus four offenses of "counselling", with all of which defendant is charged in one count. (1) counselling refusal of registration (2) counselling evasion of registration (3) counselling refusal of service in the armed forces and (4) counselling of evasion of service in the armed forces.

There are an equal number of offenses of "aiding" and of "abetting" charged in the same count. Objection was seasonably and properly taken. The jury found the defend-

ant "guilty, as charged in the one count of the indictment herein". Yet it is clear on the record that there was no counselling of evasion, and no counselling as to service in the armed forces. On what, if anything, may the defendant be later tried? To what subsequent action is the present conviction or acquittal a defense on the basis of a plea of double jeopardy? The Circuit Court misquotes the indictment by substituting the word "for" service in place of the disjunctive "or", thus cutting by half the crimes charged in one count.

The joinder of two or more charged violations *in separate counts* is authorized by the liberalized practice (rule 8 of Rules of Criminal Procedure). But this only serves the more to emphasize the essential protection that they shall *Not* be joined in one count and where they are the indictment is *void*. (Price v. U. S., 150 F2d 283, cert. den. 326 U. S. 789; Epstein v. U. S., 271 F. 282). Examples of indictments found to be duplicitous show marked similarity to the present. See U. S. v. Smith, 152 F. 542; defendant was charged with embezzlement *and* misapplication of funds *and* credits under section 592 of Title 12 of the U. S. Code. The indictment was held bad for failure to set forth separately the facts as to embezzlement, misapplication of funds and credits. To the same effect, U. S. v. Cadwallader, 59 F. 677. Even false debit and credit items are separate offenses not to be alleged in one count. U. S. v. Morse, 161 F. 429. See also U. S. v. Blakeman, 251 F. 306; U. S. v. Dedof, 42 F. Supp. 57; U. S. v. American Naval Stores Co., 186 F. 592.

How much more central to the issues and rights of the defendant is the duplicity in this case, particularly in the light of instructions, proof and verdict.

The Trial Court's attempt to strike certain portions of the indictment and to amend it constitutes reversable error.

On p. [5] the Trial Court struck certain words from the indictment; on pages [71] and [72] in stating the issue to the jury, the court's charge amended the issues actually appearing in the indictment. (Compare charge at p. [75]. Federal Courts are without power to alter or amend indictments found by a grand jury. U. S. v. Krepper, 159 F 2d 958, cert. den. 330 U. S., 824. It has even been held that where one court charges three separate offenses under the Espionage Act, sec. 3, the United States Attorney may not withdraw or *nolle pros* all but one for that would be an amendment of the indictment and violate the Fifth Amendment requiring a grand jury indictment for infamous crimes, U. S. v. Dembouski, 252 F 894.

The Trial Court erroneously refused to give requested instructions 5-11 (Pages [7-11]) embodying the law set forth in this brief and over objection of defendant caused him to testify against himself by admission of Government's Exhibit #1.

The law applicable to this case and the essentials in which the court's charge and denial of requests failed to embody this law have already been mentioned. Further, the Court admitted a letter from defendant to the U. S. Attorney General which stated that defendant had counselled. The Court, in its Colloquy with Counsel stated that it would not be received as any evidence of violation of law and that he would so instruct the jury page [19] He never did. The U. S. Attorney made much of this letter and stated: "This letter . . . is the primary basis from which the prosecution stems or begins." [17] It may be that this piece of evidence, admitted in contravention of the well established rule that a defendant cannot be made to testify against himself was *the* basis of the jury's verdict.

V

The 1948 Selective Service Act is unconstitutional and in particular is unconstitutional as applied to this petitioner.

Although the Supreme Court has upheld wartime conscription (The Selective Draft Law Cases, 245 U. S. 366 and others), it has never upheld a peacetime draft act, much less a peacetime Selective Service Act like the present. In fact the Supreme Court has been extremely cautious not to give its opinions on peacetime compulsory service, as the Court said in *Hamilton v. Board of Regents,* (293 U. S. 245):

> "There is no occasion at this time to mark the limits of governmental power in the exaction of military service when the nation is at peace."

It is therefore necessary to construct our rule beginning with the provisions of the Constitution itself. The only provisions important to this discussion, are in these words:

> Art. 1, sec. 8, "The Congress shall have power * * *
> "To declare war * * *"
> "To raise and support *Armies,* but no Appropriation of Money to that use shall be for longer term than two years;
> "To provide and maintain a *navy;*
> "To make Rules for the Government and Regulation of Land and naval *Forces;*
> "To provide for calling forth the *Militia* to execute the laws of the Union, suppress Insurrection and repel Invasions;
> "To provide for organizing, arming and disciplining the *Militia,* and for governing such part of them as may be employed in the service of the United States, *reserving to the states* respectively, the appointment of the Officers, and the *Authority to training the Militia* according to the discipline prescribed by Congress;
> * * *

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *"

Art. I, Sec. 10. "No state shall, without the consent of Congress * * * keep troops or ships of war in time of peace."

Art. II, Sec. 2. "The President shall be Commander in Chief of the Army and Navy of the United States, and of the *Militia of the several States, when called into the actual Service of the United States* * * *"

It will be seen that five types of military organizations are referred to: "Troops", "armies", "forces", "navy" and "Militia". The provisions may be summarized and relation of the federal and state governments seen if we paraphrase the Constitution thus: The federal government may raise and maintain armies and navies and govern its forces; the states may not keep troops or war ships: able-bodied man are members of State militias—that is training groups not in active service; the federal government has no militia of its own (*i. e.* no power to train the general manpower as compared to the power to train armies); the federal government may, by conscription if it chooses, take the members of the State militias into the federal army, for certain purposes. (See "Constitutionality of Peacetime Conscription," 31 Va. L. Rev. at 43-4). Others recognize these distinctions. Thus when the states kept some of their manpower permanently under arms (the state, later the National, guard) rather than in a militia, these became "troops" and had to be authorized by Congress. Col. Frederick Barnay Wiener in *A Practical Manuel of Martial Law* (1940), par. 39 states:

"Notwithstanding the National Guard must be federally recognized and is federally instructed and equipped, it is still in a *constitutional sense* militia and hence a *state force.*"

All these distinctions are inherent in the words used in the constitution (as defined by Webster's International Dictionary):

> Troops—Soldiers, collectively; an armed force.
> Army—An armed expedition.
> Forces—Strength or power for war, whether offensive or defensive * * * hence any body of soldiers, sailors or marines.
> Navy—a fleet of ships; an assemblage of vessels * * * the war vessels belonging to a nation, considered collectively.
> Militia—A body of citizens enrolled as a regular military force for periodical instruction, discipline, and drill, but not called into active service except in emergencies.

It is crystal clear that the only general manpower (militia) referred to in the Constitution belongs to the states. There is no similar power in the federal government. The only draft law ever approved by the Supreme Court was a wartime draft which put the men into the federal army —that is into "an armed expedition" and could be and was therefore sustained as an exercise of the federal power "to raise and support armies". Even the 1940 draft act, though adopted when we were officially at peace, drafted men into an army—not into a training program from which they were released at the end of a short period.

So well established are two rules of construction that mere mention need be made; (1) neither war nor any other emergency abolishes constitutional provisions or creates powers not conferred on the federal government by the constitution (*Ex parte* Quirin, 317 U. S. 1; Schechter v. United States, 295 U. S. 495, 528, Home Building and Loan Association v. Blaisdell, 290 U. S. 398 and many other cases), and (2) the federal government is one of delegated, rather than inherent, powers and cannot exercise a power not clearly given it by the Constitution. (United States v.

Butler, 297 U. S. 1; Carter v. Carter Coal Co., 298, U. S. 238, 291; Schechter Poultry Corp. v. United States, 295 U. S., 495, 528; Home Bldg. & L. Ass'n. v. Blaisdell, 290 U. S. 398, 425; Beard, The Republic (1943)).

No one in all the cases and writings that we have seen, has ever proved that the Constitution gives the federal government a "militia" power (to train the general manpower). The most that has been suggested is that the organized militia of the states (troops—National Guard) have been made, by Congress, a part of the United States army; that Congress has considered that there is a United State militia (reserve); that one Supreme Court case in upholding a state militia law has said that this militia constitute the "reserve militia of the United States as well as of the states." It is one thing for Congress to record that it considers the state militias a reserve for its own use;—that is intended by the constitution giving the federal government the power to call out the state militia; it is quite another thing for Congress to claim a power which the constitution does not give it—to train in peacetime the general or selected manpower.

Although the 1948 Selective Service Law provides that "Persons inducted into the land forces of the United States pursuant to this title shall be deemed to be members of the Army of the United States" (in an apparent attempt to gain sanction from the "army" power) the fact remains that the army, navy and marine corps were at the time of registration and have ever since been at the full strength authorized by Congress. Even if the 1948 Selective Service Law can be construed as authorizing the placement of the inductees in the "army", the actual method of operation under the 1948 Selective Service Law shows that it

is not an exercise of the "army" power but rather an attempt to create and train a federal "militia" in violation of the constitution.

But the 1948 Selective Service Act cannot be construed as a use of the "army" power. An army is recognized to be "an armed *expedition.*" An organized group of military men may be "forces" but while they are training, without any "Expedition" in mind, they are surely not an "army" and their raising is not authorized by the "army" clause.

We have already pointed out the right to freely exercise religion. To apply the Selective Service Law so as to deprive defendant of this right is to make the act unconstitutional.

We have pointed out that any statute or regulation defining acts which are criminal or to which penalties attach must be so definite that any person can know, without the slightest doubt, what he may and may not legally do. We have also shown that the words "presents" and "submit" to registration have a recognized meaning, and yet they have been applied by the court in a wholly different way, thus rewriting the statute. For neither the statute or regulations require a person "to register"—which is the only thing labelled by the court and jury as criminal. Quite apart from the rightness or wrongness of the defendant's position, can statutes and regulations capable of such widely diverse interpretation show that "definiteness" required? Or is this a case in which a criminal statute has been interpreted *against* the accused and presumed valid, contrary to all rules of construction and constitutional law?

Further, the 1948 Selective Service law and regulations are unconstitutional in permitting the local Selective Service Boards to conduct "heresy trials" of religious beliefs

and in establishing a religion and prohibiting the free exercise of any other, in violation of the 1st Amendment. In *U. S. v. Kauten,* 133 Fed. 2d 703, it was held that belief in a Divine Being was not necessary in order for a person to have a religious belief. But the 1948 Selective Service Law and the regulations thereunder define religion as a belief in a Divine Being. Other religious beliefs (and the Buddhists and religions of perhaps three-fourths of the world's people do not believe in a Divine Being) are thus in the United States, for Selective Service purposes at least, not religions at all. This is in direct violation of the express provisions of the First Amendment and the opinions of this Court in *United States v. Ballard,* 322 U. S. 78, 86 and *West Virginia v. Barnette,* 319 U. S. 624, 642 that the government may not determine orthodoxy and heresy. Whether petitioner has or has not been hurt by this provision is of no moment—it is in and renders unconstitutional the 1948 Selective Service Law.

Nor was there, at the time of the adoption of the 1948 Selective Service Law, that clear and present danger which would justify its adoption. There has just come to hand *Conscription News,* Washington, November 18, 1949. In part, page 1 reads:

> "*Army Releases Draftees it Never Needed*—Beginning December 1 the Army will offier conditional releases to 30,000 men who were drafted under a law that was passed as a result of a synthetic crisis. In the spring of 1948 a false Army intelligence report that Russian troops were on the move led to statements in Washington that there would be a war before harvest. As a result, President Truman on March 17, 1948 asked Congress for the immediate passage of Selective Service. Within a few weeks the Central Intelligence Agency evaluated the Army's report, told the President Russian troops were simply moving to spring training stations and that war was unlikely. Congress, however, was never apprised of the true situation. In fact,

as late as June, shortly before adjournment, Congress was told by General Bradley that war was still a 'plausible possibility.' Under the impact of this false war crisis Congress yielded to military pressure and passed a draft law. After 30,000 men had been drafted the Army stopped using Selective Service.

"The release of these men has been announced for budgetary reasons. By next February, the Army plans to reduce its strength from 656,000 to 630,000 men. * * * Senator Edwin C. Johnson (D., Colo.) said the day following the announcement that the proposed release 'is positive proof that the present draft law never should have been enacted. It never was necessary and I was quite convinced of it at the time but could not prove it.' "

For all of the above reasons the 1948 Selective Service Law is unconstitutional and void.

Respectfully submitted,

HARROP A. FREEMAN,
and
JOHN W. MACDONALD,
For the Petitioner.

ADDENDUM

The Statute Involved

Selective Service Act of 1948, Secs. 12 (a) (462 (a), Title 50, App. U. S. C. A.):

"(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title (said sections), rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title (said sections), or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title (said sections), or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title (said sections), or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title (said sections) or rules, regulations, or directions made pursuant to this title (said sections), or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this (said sections) or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district

court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *"

Section 6 (j) (456 (j), Title 50, App. U. S. C. A.):

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant service and training because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. * * *"

Regulation 613.3: "If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word 'Registrar' beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if the registrant had signed his Registration Card (SSS Form No. 1), *and such registrant shall thereby be registered.*"

Regulation 642.31: "a) Provided they are required and have not already been accomplished, the following steps shall be taken in connection with every

man who has registered or who is required to register under the provisions of Title I of Selective Service Act of 1948 (50 App. 98) *immediately upon his reporting to or being brought before a local board* or immediately upon his being taken into custody or his being placed in confinement:

"(1) He shall be registered. (Here follow various specific directives, including:)

"(5) b) If such man is unable or refuses to fill out any form in the manner required by paragraph (a) of this section, such form shall be filled out by a member or clerk of a local board * * * from information gained by interviewing the delinquent and from other sources.

"c) If the signature of such man is required upon any form after it is filled out and he is unable or refuses to sign his name or make his mark upon any such form, a member or clerk of a local board * * * shall sign such man's name and indicate that he has done so by signing his own name beneath the name of such man."

Regulation 613:11 "(a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) *must* be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card, except when the registrant signs the completed card."

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 468

WIRT A. WARREN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 83-90) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1949 (R. 90). The petition for a writ of certiorari was filed on November 30, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether one "who knowingly counsels * * * another to refuse or evade registration" under the Selective Service Act may be convicted of violating Section 12(a) of that Act despite the fact that his advice is not followed.

2. Whether the trial court committed reversible error in not instructing the jury, as petitioner requested, that a bona fide purpose on his part to secure a judicial test of the validity of Section 12(a) of the Selective Service Act would constitute a valid defense.

3. Whether Section 12(a) of the Selective Service Act of June 24, 1948, either inherently or as applied in the instant case, is invalid under the First Amendment as an unwarranted restriction of the freedoms of speech and religion.[1]

STATUTES INVOLVED

The pertinent provisions of the Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604 (50 U. S. C. App. 451) are as follows:

> Sec. 3. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen

[1] Other questions raised by the petitioner as to the validity of the indictment, self-incrimination, and alleged improper instructions (Pet. 5) are not deemed worthy of separate statement and are briefly treated *infra*, note 8, pp. 16-17.

and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed thereunder.

* * * * *

Sec. 12. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

STATEMENT

On December 2, 1948, petitioner Wirt A. Warren, forty years old, a practicing physician in Wichita, Kansas, was charged in the United States District Court for the District of Kansas with knowingly counseling, on or about October 23, 1948, Walter Dean Murrah, who was required to register for training and service in the United States armed forces under the 1948 Selective Service Act, to

refuse and evade such registration in violation of § 12(a) of the Act (R. 4, 34).[2]

The evidence adduced at the trial is undisputed and is briefly set forth:

Petitioner, a Unitarian Church member and opposed to war, believing that its elimination could best be effected by resistance to compulsory military training and for the purpose of informing the Government of his beliefs and his actions pertaining thereto, wrote the following letter to the Department of Justice on September 22, 1948 (R. 35, 36, 37, 38, 39, 41-42, 52):

> This will inform you that I am not obeying and do not intend to obey Paragraph a, of Section 12 of the Selective Service Act of 1948, which is that portion of the Act which provides a penalty for *knowingly* counseling, aiding, or abetting another to refuse or evade registration or service with the armed forces.
>
> I have urged my stepson, W. Dean Murrah, and others not to register under the Selective

[2] Petitioner filed a motion to dismiss the indictment as bad for duplicity and uncertainty because it also charged in the same count that petitioner knowingly counseled Murrah to refuse *to serve in the armed services* (R. 4, 5-6, 32-33). The court denied the motion holding that the inclusion of such language was not particularly "objectionable" since no evidence was introduced in support of this charge and he would so charge the jury (R. 33). Accordingly, the jury was instructed that the sole issue in the case was whether petitioner knowingly counseled Murrah to refuse to register (R. 71, 72, 75). In connection with the counseling, the indictment originally charged that petitioner "did unlawfully, willfully, * * * openly and intentionally advocate, [and] advise" Murrah to evade registration but on petitioner's motion, the quoted words were stricken as surplusage (R. 4, 5).

> Service Act of 1948, and I intend to continue to counsel him and others to refuse registration and service under this law.
>
> The Selective Service Act of 1948, is a law which I feel morally bound to break. I have arrived at this conclusion entirely on a personal basis and not as the result of influence by any religious, pacifist, or political group. In particular I wish to make it clear that I am *neither* a *Communist nor* a fellow-traveler. [R. 19-20, Gov. Ex. 1.]

A few weeks prior to October 20, 1948, the eighteenth birthday of petitioner's stepson, Walter Dean Murrah [3] and the date on which Murrah became eligible for registration under the Selective Service Act, petitioner, while working about the house with Murrah and entirely on his own initiative, advised him not to register for military training when he became of age (R. 22-23, 27, 41, 46-47). When Murrah indicated that such action constituted a criminal offense, punishable by imprisonment, petitioner replied, "that might be the best thing to do" (R. 23, 41, 47). As an alternative, he suggested that Murrah leave for Canada or Mexico, with petitioner bearing the expense (R. 23, 41). He continued to so advise Murrah on several occasions thereafter up to October 25, 1948 (R. 46, 47, 48), but Murrah ignored the advice

[3] Petitioner provided an education and a home for Murrah with him, his wife (Murrah's mother whom he married in 1939), and their two children (R. 21, 24, 34-35).

and registered as required on that date (R. 23-24, 48).

Upon receipt of the above-quoted letter by the Department of Justice, two Federal Bureau of Investigation agents interviewed petitioner in his office in November 1948. Petitioner freely and without any coercion whatsoever, after being warned that the interview was entirely voluntary, that he had a right to a lawyer and that anything he said could be used against him, said (and reiterated at the trial) that during World War II by virtue of his classification as a conscientious objector, he served in a conscientious objector's camp and later as a physician in the Eastern State Hospital at Williamsburg, Virginia; that having received a copy of the 1948 Selective Service Act from his Congressman in June 1948 and studied it, he was familiar with all its provisions, particularly the prohibitions contained therein against his actions relating to counseling to evade registration; that irrespective of this, "his belief was such that he could not conscientiously obey this law and that as a result * * * it was necessary for him to advise people not to register"; that pursuant to such belief he so counseled Murrah; that although he had not as yet counseled others in this manner, he intended to do so; and that he placed in his waiting room pamphlets urging non-registration. (R. 25-30, 39-40, 41, 42, 45, 46-47, 48, 50, 52.)

In his testimony, petitioner explained that the motivating factor behind his advice to his stepson was his honest and conscientious opposition to war and violence for any purpose whatsoever, resulting from religious teaching, his own thinking and reading from 1939 to date, and his belief that "there are certain laws [relating to war particularly] which are detrimental to mankind as a whole and therefore should not be obeyed,"—laws which he felt "morally bound to break"; that he desired to inculcate these beliefs in Murrah as part of his religious education and as "a way to the better life" (R. 36, 37, 38, 39, 41-42, 44, 45-46, 50, 52, 53, 54); and that since 1940 his thinking on the subject had evolved to a point where he felt that merely registering as a conscientious objector was not a sufficiently vigorous expression of opposition to war (R. 37-38). On direct examination, in reply to a question whether his purpose in counseling was to test the validity of the law, petitioner replied in the affirmative (R. 52, 55).

At the conclusion of the trial, the judge (Mellott, D. J.) denied petitioner's request to instruct the jury to the effect that a bona fide intent to test the validity of the law in question was a valid defense to a charge of "knowingly counseling" (R. 7, 62) and instead charged the jury as follows (R. 74):

> In outlining to you the charge made in this case you will remember that I used the word "knowingly" that the defendant did know-

> ingly counsel. The word knowingly is not used in this statute in any highly technical sense, but it is to be taken in its ordinary and commonly understood meaning as designating an act done intentionally, with an awareness of what one is doing, and not the result of mere disinterest, ignorance or inadvertence.

Petitioner was found guilty and sentenced to two years' imprisonment (R. 12-13, 80). On appeal, the judgment of conviction was affirmed (R. 90).

ARGUMENT

1. The petitioner contends (Pet. 18-21) that his admitted counsel of refusal or evasion, not having borne fruit since his stepson did in fact register under the Selective Service Act, was not in violation of Section 12(a) of the Act. So to read the Act of 1948 is to turn one's back on history; for, under World War I statutes relating to the same type of offense as is here charged, this Court made it perfectly clear that there was "no ground for saying that success alone warrants making the act a crime." *Schenck* v. *United States,* 249 U. S. 47, 52; *Goldman* v. *United States,* 245 U. S. 474, 477; see also *Reeder* v. *United States,* 262 Fed. 36 (C. A. 8), certiorari denied, 252 U. S. 581.[4] It is patent

[4] The cases here cited involved conspiracies to violate the Espionage Act of 1917. The point at issue in the case at bar appears not to have been decided under the Selective Draft Act of 1917, 40 Stat. 76, which in language perhaps more favorable to petitioner's contention than the present act in that it omits the word "counsels", penalized any person who "evades or aids another to evade the requirements of this Act." Section 6. Cf. *Fraina* v. *United States,* 255 Fed. 28, 33 (C. A. 2).

on the face of Section 12(a) that many primary offenses are created which may be committed by persons other than those who are required to register or serve. Congress plainly intended to deter, by these penal provisions, not only those who might themselves be reluctant to register or serve in the Nation's armed forces, but also to curb any action which would tend to interfere with speedy and efficient operation of the Selective Service recruitment machinery. The charge here involved is not of a secondary, dependent offense; the statute makes the counselling of which petititoner has been convicted a primary, independent crime. This is the conclusion recently announced by the Court of Appeals for the Sixth Circuit in *Gara* v. *United States,* decided November 28, 1949.

2. Petitioner maintains that the jury was not properly instructed, as requested, with regard to the bearing upon criminal intent of an asserted purpose on his part to test the validity of Section 12(a) (Pet. 9, 56-62). The trial judge charged the jury (*supra,* pp. 7-8) that the statute requires only that the defendant act intentionally and consciously.

We submit that the denial of petitioner's requested instruction and the granting of the one given was entirely correct. Assuming it to be true, as petitioner contends, that a "corrupt intent" is an element of the crime in question and requires consciousness of wrongdoing, petitioner

is not aided by this rule. He was clearly conscious that his urging and counselling Murrah not to register would violate the Act and, further, that by failing to register, Murrah would also commit a criminal offense (*supra,* pp. 4-5).

That he may have been conscious of no wrongdoing in some moral or religious sense (cf. Pet. 56-59) is, if at all relevant, a defense not available at this stage. For petitioner requested no instructions along these lines of the trial court (R. 6-11); the question of consciousness of wrongdoing *vel non,* even in the non-secular sense, is one of fact for the jury, and an appellate court cannot be asked to decide a question not sought to be submitted to the jury.

Petitioner further contends that, despite his knowledge that a violation of the statute was involved in his conduct, he would be excused if his purpose was in good faith to secure a test of the constitutional issues,[5] under the authority of *Keegan* v. *United States,* 325 U. S. 478, and *Okamoto* v. *United States,* 152 F. 2d 905 (C. A. 10), based on the *Keegan* decision. But genuine belief in the unconstitutionality of a statute is not recognized as a valid defense. *Ex parte Young,* 209 U. S. 123, 147-148; *United States* v. *Anthony,* 24 Fed. Cas. No. 14,459 (C. C. N. D. N. Y.). As

[5] The uncontradicted testimony that petitioner suggested to his stepson that he might go to Canada or Mexico at petitioner's expense, in order to escape registration (R. 23), leaves little room for his present contention that he was seeking to create a "test case".

Mr. Chief Justice Stone, expressing his dissenting views and those of Mr. Justice Reed, Mr. Justice Douglas, and Mr. Justice Jackson, in *Keegan* v. *United States,* 325 U. S. 478, 505, put it:

> Plainly one who would assail the validity of a statute in a test case can do so only by violating its provisions, here by knowingly counselling another to evade registration or service in the armed forces. One who thus evaded or counselled evasion of military service could not defend on the ground that he violated the Act in order to test its constitutionality. He nevertheless does the act which the statute prohibits and nonetheless intended to do it even though his purpose was to establish that the statutory prohibition is unconstitutional. There is no freedom to conspire to violate a statute with impunity merely because its constitutionality is doubted. The prohibition of the statute is infringed by the intended act in any case, and the law imposes its sanctions unless the doubt proves to be well founded.

In other words, petitioner's contention is self-contradictory: if the purpose to test constitutional validity is a defense, there can be no test, for courts will not render advisory constitutional opinions where a case of violation of the statute has not been made out.

The opinion in the *Keegan* case upon which the petitioner relies, that of Mr. Justice Roberts, concurred in by Mr. Justice Frankfurter and Mr. Justice Murphy (there being no opinion of the

Court), is not to the contrary. The judgment there reflected rested on the view that the Government had failed to prove a case of counselling "to *evade registration or service*" under Section 11 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 311. (Emphasis supplied by Mr. Justice Roberts, 325 U. S. 478.) Mr. Justice Roberts found a crucial distinction between the words "evade" and "refuse". The latter was not in the 1940 Act and, Mr. Justice Roberts said, "Plainly enough the Act distinguishes evasion, a species of fraudulent conduct, from mere neglect of duty and from forcible and violent interference or resistance". 325 U. S. at 487. Evasion was said to connote "artifice" and one "with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; * * * but this is not knowingly counselling, *stealthily and by guile*, to evade its command." 325 U. S. at 493-494, emphasis supplied.

These views have no bearing on this case. Congress, in enacting the Act of 1948, here involved, inserted the word "refuse" (see Section 12(a), *supra*, p. 3) and thus supplied the omission discerned by Mr. Justice Roberts and those who joined with him in the Act of 1940. The Senate Committee reporting on the bill which became the 1948 Act, pointed out that while it "is substantially a reenactment of section 11 of [the 1940] act",

"certain changes of language have been made to incorporate judicial determinations made pursuant to the predecessor act." S. Rep. No. 1268, 80th Cong., 2d Sess. p. 20. Thus the general rule, reflected in Chief Justice Stone's opinion in the *Keegan* case, is here applicable.

3. Petitioner attacks Section 12(a) of the Selective Service Act as in violation of the freedoms of speech and religion guaranteed by the First Amendment. But the constitutional issues thus tendered will be found, we believe, to be less novel and extensive than petitioner maintains.

The question of abridgment of the right of free speech, must be considered as settled by decisions of this Court[6] in cases which involved attempts by means of speeches and circulars to obstruct the recruiting and enlistment of young men in the service of the armed forces. The cases correspond to that here, the only distinction being that they did not involve the identical statute and the violations occurred during the period of actual hostilities. The first distinction is clearly irrelevant to the question of constitutionality since the statute here prohibits the same class of offenses considered

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[6] *Schenck* v. *United States*, 249 U. S. 47; *Gilbert* v. *Minnesota*, 254 U. S. 325; *Frohwerk* v. *United States*, 249 U. S. 204; *Debs* v. *United States*, 249 U. S. 211; *Ruthenberg* v. *United States*, 245 U. S. 480; *Goldman* v. *United States*, 245 U. S. 474; for decisions in other federal courts, see *Dunne* v. *United States*, 138 F. 2d 137 (C. A. 8), certiorari denied, 320 U. S. 790; *Fraina* v. *United States*, 255 Fed. 28 (C. A. 2); *Gara* v. *United States*, decided November 28, 1949 (C. A. 6), involving the identical statute.

in those cases—attempting to impede recruitment by words. Likewise, the second distinction is not significant in the circumstances of this case. Our state of war has not yet ended (*Ludecke* v. *Watkins*, 335 U. S. 160) and it is clear, moreover, that the power of Congress to "raise and support armies" and to "provide and maintain a navy" exists both in peace and war.

Section 12(a) of the Selective Service Act of 1948 makes it unlawful knowingly to counsel non-registration. Petitioner, while recognizing that the rights guaranteed by the First Amendment are not absolute, contends that there was no "clear and present danger" to national security justifying the passage of such a measure (Pet. 26-31). But Congress, in Section 1(b) of the Act here involved, declared "that an adequate armed strength must be achieved and maintained to insure the security of this Nation." That declaration must certainly suffice as an answer to petitioner's attack on the statute on its face (*Whitney* v. *California*, 274 U. S. 357; *Gitlow* v. *New York*, 268 U. S. 652). And even if more is needed to sustain the validity of its application to the case at bar, there is no real difficulty. For the "substantive evil" of which there must be a "clear and present danger" may be something less than the destruction of our Government.[7] The

[7] *Giboney* v. *Empire Storage Co.*, 336 U. S. 490; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Bridges* v. *California*, 314 U. S. 252; *Pennekamp* v. *Florida*, 328 U. S. 331, particularly Mr. Justice Frankfurter, concurring, at 328 U. S. 353.

evil which Congress here sought, and had a right, to prevent was resistance to the requirement of registration. The question in this case must be whether petitioner's counsel to Murrah created a clear and present danger of that evil. The answer, we submit, is clear. Were the speaker's relationship with his auditor a less intimate one, were his influence on the person being counselled less strong than that of father on son, the question might be more difficult. But when a father advises a son not to register and offers to pay for an escape to Canada or Mexico, the danger of resistance to registration is clear and present if those words have any meaning. And, if "incitement" is a touchstone of validity (cf. Pet. 6-7) it is present in this case.

Petitioner's claim of infringement of freedom of religion, buttressed by the claim of parental right, may be similarly disposed of, for "it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others." *Prince* v. *Massachusetts*, 321 U. S. 158, 164. If petitioner's freedom of speech argument must be rejected, so must this.

As was said in the *Prince* case, the state's "authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." 321 U. S. at 166. That principle was stated and applied in a case in which the child's conduct in question was itself an exercise of a right protected by the First

Amendment. Resistance to the draft, as such, has no such stature. Counselling such resistance is, consequently, no more immune from regulation in the national interest than permitting preaching by children on the streets.

Finally, petitioner's attempt to deny that conscientious objection to service is a matter of legislative grace, not constitutional right (Pet. 35-56, but see *Hamilton* v. *Regents,* 293 U. S. 245, 264) has no real relevance here. Any alleged "right" to refuse to serve does not, of necessity, carry with it the right to urge the same course on others. That right to proselytize is, of course, the right to speak or to practice one's religion and it is not, as we have sought briefly to show above, violated by petitioner's conviction.

This case is aptly described by Mr. Justice Cardozo, concurring in *Hamilton* v. *Regents,* 293 U. S. 245, 268: "One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law."[8]

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[8] Other questions raised by petitioner may be shortly disposed of: (1) *The indictment*—the colloquy appearing at R. 76-78 disposes of the contention that the indictment was defective in that it failed to charge that petitioner's stepson was not within any of the exceptions to the registration requirement found in the Act. See also *Edwards* v. *United States,* 312 U. S. 473, 482-483. As shown in the Statement, *supra,* p. 5, petitioner is plainly in error when he states (Pet. 63) that "The proof is clear he [Murrah] was *not* 18 when counseled." Nor was the trial judge powerless to rule (R. 33) that the charge of counselling refusal and evasion of *service* should not be submitted to the jury. *Goto* v. *Lane,* 265 U. S. 393, 402-403. Finally, it is clear that the indictment was not void for du-

CONCLUSION

The decision of the court below is correct, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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plicity. *Crain* v. *United States*, 162 U. S. 625, 634-636, and cases cited; *Connors* v. *United States*, 158 U. S. 408, 410-411. (2) *Self-incrimination*—the charge that the petitioner's privilege in this respect was violated by the admission in evidence of his letter to the Department of Justice is baseless. Petitioner was not forced to write it; he did so voluntarily. Moreover, he waived his privilege by taking the stand at his trial. (3) *Instructions*—petitioner appears to complain of nothing in the instructions which is not dealt with elsewhere under different descriptive headings.

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